

6-1-1988

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## Recommended Citation

Theodore F. Haas, *The Rationality and Enforceability of Contractual Restrictions on Divorce*, 66 N.C. L. REV. 879 (1988).Available at: <http://scholarship.law.unc.edu/nclr/vol66/iss5/2>

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# THE RATIONALITY AND ENFORCEABILITY OF CONTRACTUAL RESTRICTIONS ON DIVORCE

THEODORE F. HAAS†

*Almost all states now allow unilateral no-fault divorce. Most states also enforce antenuptial agreements in varying forms. In this Article Professor Haas juxtaposes these two trends and examines an unusual kind of antenuptial agreement: the contract not to divorce. He offers a Model Agreement proposing such an arrangement and then analyzes such contracts under constitutional and contract law principles. The Article concludes with a discussion of the implications for child custody determinations under such agreements.*

In 1951, a Tennessee couple with an "unusually turbulent" marital history were about to marry one another for the third time, but prior to doing so, they entered into an antenuptial agreement.<sup>1</sup> It provided that "[s]hould either party file a divorce against the other, then the party so filing shall by such filing forfeit to the other all right, title, and interest in all the property, real, personal or mixed, jointly held and owned by them."<sup>2</sup> If the agreement was really meant to dampen their fondness for periodic judicial purges, it was not a success. Within a couple of years, Mr. Sanders was in court seeking to have the agreement declared void as against public policy.<sup>3</sup>

Although a failure in the Sanders' case, the Sanders' agreement is based on an idea that is worth exploring for both its practical and theoretical interest in the present age of liberal divorce laws and greater contractual freedom for married couples.<sup>4</sup> Something like the Sanders' agreement may be attractive to couples who are not already adept in the marital martial arts and who genuinely wish at the time they marry to strengthen their marriages by providing them-

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1. Sanders v. Sanders, 40 Tenn. App. 20, 33, 288 S.W.2d 473, 478-79 (1956).

2. *Id.* at 24, 288 S.W.2d at 475.

3. *Id.* at 22, 288 S.W.2d at 474.

4. See generally UNIFORM PREMARITAL AGREEMENT ACT § 3 (permitting divorce planning in such agreements). Contractual restrictions on divorce have been employed or attempted in other cultures allowing easy divorce. The institution of the *ketubbah* in Jewish marriage law was an attempt to deter husbands from divorcing their wives by making the cost of divorce prohibitive. Greenstone, *Ketubah (or Ketubbah)—Legal*, in 7 JEWISH ENCYCLOPEDIA 472 (1904). For a contemporary American use of the *ketubbah* in this regard, see *In re Marriage of Nogherey*, 169 Cal. App. 3d 326, 215 Cal. Rptr. 153 (1985). The court denied enforcement of the agreement because it was the wife who sought the divorce and, far from deterring her from seeking a divorce, the agreement encouraged her to obtain one with "all deliberate speed." *Id.* at 331, 215 Cal. Rptr. at 156.

Under Roman law, agreements not to divorce or agreements providing for penalties upon divorce were invalid. ALEX. C. 8.38.2; M. KASER, ROMAN PRIVATE LAW 247 (R. Dannenbring trans. 2d ed. 1968).

selves with legal deterrents to the risk of a pure unilateral no-fault divorce.<sup>5</sup>

This Article explores the reinstitution of a restrictive divorce regime by contract. The Article addresses the following questions: Is it rational to restrict one's freedom to divorce? What should the terms of the agreement be? Would such an agreement be legally enforceable or is the legal protection of individual freedom to marry and divorce so strong that such an agreement would be void as a matter of either constitutional or contract law?

Traditionally the law of marriage and divorce was doubly restrictive. First, it restricted the entrance into and the exit from marriage.<sup>6</sup> Second, the law restricted the parties' ability to alter the restrictive state regime through private agreement.<sup>7</sup> That traditional regime has been deeply eroded by two liberalizing trends. First, not only are there fewer marital restrictions,<sup>8</sup> but all states have enacted no-fault divorce laws.<sup>9</sup> Second, states do not so jealously guard the law of marriage and divorce: private ordering of the incidents of marriage and divorce, by antenuptial, postnuptial, or separation agreements are becoming widely recognized.<sup>10</sup> Indeed, contracts in lieu of marriage are enforceable in many states.<sup>11</sup>

Private ordering of marital and postmarital relationships generally has been accepted with respect to certain incidents of those relationships—ownership of property and, to a lesser extent, support.<sup>12</sup> However, divorce itself—the change

5. By a pure unilateral no-fault divorce, I refer to one that neither is mutually agreed to by the spouses nor could be unilaterally obtained on fault grounds.

6. On traditional marriage restrictions, see H. CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* § 11.1 (1968) (discussing restrictive traditional divorce law), and M. GLENDON, *STATE, LAW AND FAMILY: FAMILY LAW IN TRANSITION IN THE UNITED STATES AND WESTERN EUROPE* 24-25 (1977) (noting traditional constraints based on family authority and the public interest).

7. 15 S. WILLISTON, *LAW OF CONTRACTS* § 1741, at 63 (W. Jaeger 3d ed. 1972).

8. See M. GLENDON, *supra* note 6, at 25. The United States Supreme Court has declared various marital restrictions unconstitutional. *Turner v. Safley*, 107 S. Ct. 2254 (1987) (marriage by prisoners); *Zablocki v. Redhail*, 434 U.S. 374 (1978) (marriage by persons with unmet support obligations); *Loving v. Virginia*, 388 U.S. 1 (1967) (interracial marriages).

9. In 1985 South Dakota became the last state to enact a no-fault divorce statute. 11 Fam. L. Rep. (BNA) 1274 (Apr. 9, 1985). See generally M. GLENDON, *supra* note 6, at 235 (marriage increasingly terminable at will and divorce proceedings "increasingly being seen as the mere formalities they are").

10. L. WEITZMAN, *THE MARRIAGE CONTRACT: SPOUSES, LOVERS AND THE LAW* 347 (1981); Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CALIF. L. REV. 204, 280, 285 (1982). See *infra* text accompanying notes 136-53.

11. *E.g.*, *Marvin v. Marvin*, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976) (recognizing various theories, including contract, on which property and support rights may be founded upon termination of unmarried cohabitation). See generally Annotation, *Property Rights Arising from Relationship of Couple Cohabiting Without Marriage*, 3 A.L.R.4TH 13 (1981) ("nonmarital cohabitation has become both increasingly prevalent and increasingly recognized as a theoretically defensible lifestyle, and the law can thus no longer plausibly ignore these relationships").

12. See generally Annotation, *Modern Status of Views as to Validity of Premarital Agreements Contemplating Divorce or Separation*, 53 A.L.R.4TH 22 (1987) (discussing cases dealing with "the question whether premarital agreements setting the terms for maintenance, maintenance pending divorce, or property division in the event of divorce or separation, are void as a class."). Although some states do not permit an antenuptial agreement to control the matter of spousal support, *In re Marriage of Winegard*, 278 N.W.2d 505, 512 (Iowa), *cert. denied*, 444 U.S. 951 (1979); *Duncan v. Duncan*, 652 S.W.2d 913, 915 (Tenn. Ct. App. 1983), the trend is definitely in favor of permitting the agreement to control this matter. See, *e.g.*, *Newman v. Newman*, 653 P.2d 728, 734 (Colo. 1982) (*en banc*) ("There is no statutory proscription against contracting for maintenance in the antenuptial

of marital status—has remained a matter of public rather than private ordering.<sup>13</sup> But it is just the issue of the private ordering of marital status that I wish to explore: whether spouses can contractually limit, directly or indirectly, their right to a divorce.

This question brings the two liberalizing trends of family law, which have appeared to run parallel, into conflict. The weakening of state restrictions on divorce and on the private ordering of marital and postmarital relationships has tended to diminish the legal obligations of marriage. But the new contractual freedom can be used to counteract the new freedom to divorce. Not everyone is pleased with the general liberalizing trend,<sup>14</sup> and there are reasons why a person would desire a marriage that is legally indissoluble or dissoluble only on fault grounds. Some are pecuniary. Under the laws of inheritance a spouse has rights that are lost upon divorce.<sup>15</sup> Upon divorce, complementarity and economies of scale are lost and remain uncompensated in the division of property.<sup>16</sup> Disinvestment in one's career or other paid work for the sake of maximizing family welfare entails a risk that at the time of divorce is often borne individually rather than spread over both spouses.<sup>17</sup> Further, a person may want to impede the dissolubility of marriage because he desires, for social or religious reasons, to

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agreement."); *Gant v. Gant*, 329 S.E.2d 106, 116 (W. Va. 1985) (antenuptial agreements that "establish property settlements and support obligations at the time of divorce are presumptively valid"). An exception is made even in those states permitting the agreement to control, however, when failure to award support would result in one of the spouses' becoming a public charge. *Osborne v. Osborne*, 384 Mass. 591, 599, 428 N.E.2d 810, 816 (1981). An agreement that adversely affects the support rights of the parties' children will not control that matter. *In re Marriage of Ayo*, 190 Cal. App. 3d 442, 451-52, 235 Cal. Rptr. 458, 463 (1987); *Miesen v. Frank*, 361 Pa. Super. 204, 209-10, 522 A.2d 85, 87-88 (1987).

13. There is no readily discernible trend either toward the reinstitution of common law marriage or toward the institution of common law divorce. By common law divorce, I refer simply to divorce by mutual agreement with no required judicial or other governmental action. Although such a method of divorcing is unknown to Anglo-American law, it can be found in other legal cultures. The Soviet Union has at times permitted divorce either by one of the spouses unilaterally or by mutual agreement. Gray, *Scholarship on Soviet Family Law in Perspective*, 70 COLUM. L. REV. 236, 246 (1970); Gsovski, *Marriage and Divorce in Soviet Law*, 35 GEO. L.J. 209, 209 (1947). Islamic nations permit divorce by the husband's announcement that he is thereby divorcing his wife. Some nations require that the statement be made to a government official; others do not. *Chaudry v. Chaudry*, 159 N.J. Super. 566, 388 A.2d 1000, cert. denied, 78 N.J. 335, 395 A.2d 204 (1978); Pearl, *Recognition of the Talaq: Some Recent Cases*, 43 CAMBRIDGE L.J. 49, 49 (1984).

14. See G. GILDER, *MEN AND MARRIAGE* (1986). One commentator has suggested,

The new [no-fault divorce] law reflected and reinforced the movement for feminine equality and independence. But it retreated from the idea that our law should have special concern for institutions with the historic function of making males responsible for their families; and for creating units within which, between spouses and among parents and children, a principle of open-ended obligation prevails. The result is an impoverished moral order.

Selznick, *The Idea of a Communitarian Morality*, 75 CALIF. L. REV. 445, 452 (1987).

15. Unlike alimony, this right may be lost even in an *ex parte* divorce obtained in a state that lacks in personam jurisdiction over the divorced spouse. Compare *Simons v. Miami Beach First Nat'l Bank*, 381 U.S. 81 (1965) (extinction of dower rights by *ex parte* foreign divorce) with *Vanderbilt v. Vanderbilt*, 354 U.S. 416 (1957) (support rights not extinguished by *ex parte* foreign divorce).

16. L. WEITZMAN, *THE DIVORCE REVOLUTION* 60-61 (1985); Espenshade, *The Economic Consequences of Divorce*, 41 J. MARRIAGE & FAM. 615, 620 (1979). For a judicial statement of the position that division of the couple's property fairly compensates each spouse for dissolution of the marriage, see *Olsen v. Olsen*, 98 Idaho 10, 12-22, 557 P.2d 604, 606-16 (1976) (Shepard, J., dissenting).

17. L. WEITZMAN, *supra* note 16, at 184-89.

preserve his status as a married person<sup>18</sup> or, more generally, to preserve at least a societal remnant governed by "traditional family values."<sup>19</sup> Perhaps most important, parents or prospective parents may wish to limit the risk of becoming a noncustodial parent.<sup>20</sup>

In a simpler time it may have taken the direct experience of marital discord to raise contractual divorce deterrents to consciousness, but in a more enlightened era such as our own, in which the Sanders' hard-won knowledge is commonplace, one knows that one cannot escape choice. Today ignorance of the risks of divorce must be willful. Entering into a marriage that either spouse can unilaterally dissolve is no more romantic than entering into one that can be dissolved only upon mutual agreement or showing of marital fault.

This Article is divided into four parts. In Part I, I explore the foundations, and especially the rational foundation, of agreements to restrict the right of divorce. In Part II, I expound an agreement that is responsive to the concerns noted above. The divorce restrictions in this agreement consist of barring unilateral no-fault divorce and/or burdening it by disfavoring a spouse who obtains a unilateral no-fault divorce in determining property, spousal support, and custody rights. In Part III, I examine the constitutionality of such restrictions, and in Part IV, I examine such restrictions in light of contract law. I conclude that such restrictions are rational even for a person committed to maximizing her individual welfare; that they are constitutional; and that they are valid under contract law, although I recognize that the validity of a bar to divorce and the validity of determining custody rights based on whether a spouse obtains a unilateral no-fault divorce are more problematic than the validity of determining property and spousal support rights on that basis.

## I. FOUNDATIONS OF THE DECISION TO RESTRICT DIVORCE

A person's decision to restrict his right to divorce may be made along two distinct lines of thought. One is communitarian and maintains either that the community authoritatively commands a restrictive divorce regime or that, in

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18. *Sharma v. Sharma*, 8 Kan. App. 2d 726, 727, 667 P.2d 395, 395 (1983) (Indian woman informed court that the spouses' "Hindu religion does not recognize divorce, and that if she returns to India as a divorced woman, her family and friends will treat her as though she were dead"); *Williams v. Williams*, 543 P.2d 1401, 1402 (Okla. 1975) (wife contended court lacked authority to grant divorce on grounds of incompatibility because divorce "contravenes . . . the authority of God, the Bible and Jesus Christ"), *cert. denied*, 426 U.S. 901 (1976).

19. See R. BELLAH, R. MADSEN, W. SULLIVAN, A. SWIDLER & S. TIPTON, *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* (1985); G. GILDER, *supra* note 14. As a symptom of societal dissolution, marital dissolution is positively correlated to the risk of suicide. Stack, *The Effects of Marital Dissolution on Suicide*, 42 J. MARRIAGE & FAM. 83 (1980); Wasserman, *A Longitudinal Analysis of the Linkage Between Suicide, Unemployment, and Marital Dissolution*, 46 J. MARRIAGE & FAM. 853 (1984).

20. See G. GREIF, *SINGLE FATHERS* (1985); T. OAKLAND, *DIVORCED FATHERS: RECONSTRUCTING A QUALITY LIFE* 111 (1984) (noting loss of child to father as cost of divorce); M. ROMAN & W. HADDAD, *THE DISPOSABLE PARENT: THE CASE FOR JOINT CUSTODY* (1978); G. SILVER & M. SILVER, *WEEKEND FATHERS* 3 (1981) ("Men are no longer content to quietly leave the house that has been home to them for many years. They are no longer content to become Weekend Fathers or ex-parents by judicial decree. They are no longer content to be mere money machines.").

any event, the community is better off if the individuals in it bind themselves to a restrictive marital regime.<sup>21</sup> This line of thought may rest on religious or secular grounds. Some may feel bound by church teachings not to divorce even when they believe they would be happier in purely secular terms if they did.<sup>22</sup> Others may feel bound by a nonreligious morality not to divorce simply because they have promised to take their spouses until death, whatever life's vicissitudes. Others may feel that their own individual welfare should be subordinated to the welfare of the community, and that divorce is a significant cause of a more general social disintegration.<sup>23</sup> Of course, an individual may act under a combination of these influences. If one believes that the community commands or is better off under a restrictive divorce regime, instituting that belief either through general legislation or, as a second best, through legally binding contract becomes an attractive option.

Another line of thought appeals not to communitarian virtue but to enlightened self-interest. I refer to the ethical view that takes enlightened self-interest as its goal as *individualistic utilitarianism*. For an individualistic utilitarian, rational choice consists in the maximization of her utility function of goods, services, and activities; that is to say, she attempts to derive the greatest satisfaction she can from her life.<sup>24</sup>

The institution of marriage, like much else in American culture, is permeated by individualistic utilitarianism.<sup>25</sup> Indeed, it is the intellectual foundation of

21. [T]hough in particular cases the repugnance of the law to dissolve the obligations of matrimonial cohabitation may operate with great severity upon individuals; yet it must be carefully remembered that the general happiness of the married life is secured by its indissolubility. . . . In this case, as in many others, the happiness of some individuals must be sacrificed to the greater and more general good.

Evans v. Evans, 161 Eng. Rep. 466, 467 (1790); see *Maynard v. Hill*, 125 U.S. 190, 205 (1888) (legislative control of marriage justified by the importance of marriage to "the morals and civilization of a people").

22. See, e.g., Pope Pius XI, Encyclical *Casti Connubii* (December 31, 1930), in OFFICIAL CATHOLIC TEACHINGS: LOVE AND SEXUALITY 23, 25 (O. Liebard ed. 1978) ("[T]he nature of matrimony is entirely independent of the free will of man, so that if one has once contracted matrimony he is thereby subject to its divinely made laws and its essential properties.").

23. See *supra* note 21.

24. Smart, *Utilitarianism*, in 8 THE ENCYCLOPEDIA OF PHILOSOPHY 206, 207 (P. Edwards ed. 1967). This position provides the foundation for the modern application of economics to human behavior not limited to the allocation of material goods to satisfy material wants. For the application of this approach to marriage and the family, see G. BECKER, A TREATISE ON THE FAMILY (1981); R. POSNER, ECONOMIC ANALYSIS OF LAW, ch. 5 (3d ed. 1986); Levinger, *A Social Psychological Perspective on Marital Dissolution*, 32:1 J. SOC. ISSUES 21 (1976).

25. Traditional utilitarianism aims at the greatest happiness for the greatest number, that is, it aims at maximizing the societal well-being. Smart, *supra* note 24, at 207-08. Individualistic, or egoistic, utilitarianism aims at the greatest happiness of the subject. *Id.* at 207. While individualistic utilitarianism may seem like an unnecessarily laborious way of saying egoism or selfishness, those terms have negative connotations, whereas the theory and practice of individualistic utilitarianism views purposive maximization of the subject's own well-being either as good or as morally neutral. The subject views herself as having a duty to herself to maximize her own happiness. A recent popular study suggests the pervasiveness of this ethos in American culture. See generally R. BELLAH, R. MADSEN, W. SULLIVAN, A. SWIDLER & S. TIPTON, *supra* note 19 (reversing the order of the words and calling it utilitarian individualism, to distinguish it from expressive individualism). See also J. UDRY, THE SOCIAL CONTEXT OF MARRIAGE 474 (3d ed. 1974) ("In the past hundred years, Americans have redefined the nature of marriage . . . as an arrangement of mutual gratification.")

modern liberal divorce laws, in that such laws are based on the view that persons should not be "trapped" in "dead marriages," but should remain free to maximize individual utility either by going it alone or by forming a new marital partnership. It is my contention that even under an ethical premise of individualistic utilitarianism, restricting the right to divorce is a rational choice. Because such a contention seems paradoxical, it is necessary to explore this line of justification at greater length than the line that appeals to communitarian virtue.

The rationality of marriage under modern legal rules is an instance of the more general case of the rationality of cooperative ventures.<sup>26</sup> Individualistic utilitarianism does not consider group loyalty either good in itself or as a privileged instrumental good.<sup>27</sup> The cooperative venture or partnership is a rational choice for an individualistic utilitarian because it is a means of enhancing the utility of the individual members. It is, however, at least apparently rational for each member of the partnership to continue to look to her own utility function. Thus, the partnership's continuation depends on its net benefits to each member continuing to exceed the net benefits of her alternatives.

The individualistic utilitarian model of the marital partnership states that a person marries when she believes that she has discovered her best realistic alternative and that she divorces when she believes she has a more attractive realistic alternative.<sup>28</sup> Although both the marriage decision and the divorce decision are based on the selection of the best realistic alternative, there is a major structural difference between the two. The marriage decision must be bilateral in that it requires the agreement of the prospective spouse; however, the divorce decision, under modern American law, can be unilateral. Thus, if one partner has a superior opportunity, taking into account the costs to her—psychic as well as monetary—of dissolving the present marriage,<sup>29</sup> she may unilaterally dissolve the marriage even if the other may be worse off as a result of the dissolution.

The tension between cooperation and selfishness that exists for the members of partnerships can be set out in a matrix of outcomes of different behaviors in different contexts.<sup>30</sup> Each partner has a choice of behaviors: he may be either

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26. See D. GAUTHIER, *MORALS BY AGREEMENT* (1986); D. PARFIT, *REASONS AND PERSONS* (1984); J. RAWLS, *A THEORY OF JUSTICE* (1971).

27. Sen & Williams, *Introduction*, in *UTILITARIANISM AND BEYOND* 5-6 (A. Sen & B. Williams eds. 1982).

28. To call something the best realistic alternative implies the existence of both opportunity costs and transaction costs. Every noncoerced decision to marry has alternatives: to marry another person; to continue one's search for a spouse; not to marry. The opportunity cost of any choice is the perceived value of the most attractive foregone alternative. The decision is realistic in two respects. First, marriage requires the consent of the person whom one has decided to marry. Second, the decision is realistic in that the decisionmaker decides that continuing the search for an even better spouse should not be worth the cost of the search given the likelihood of success. In other words, the decisionmaker may acknowledge that more attractive spousal candidates exist somewhere out there but decide that the cost of finding them—the transaction cost—is simply not worth the expected difference in value between the known attractive candidate and the unknown more attractive candidates. The use of the term "realistic" is not meant to imply that the decision is a wise one or even a deeply considered one.

29. Levinger, *supra* note 24, at 25-27, 36-40 (discussing material, symbolic and affectional barriers to divorce).

30. See D. GAUTHIER, *supra* note 26, at 79-82; D. PARFIT, *supra* note 26, at 55-62.

cooperative or selfish. To be selfish is simply to seek maximization of one's own welfare without concern for the welfare of anyone else. To be cooperative is to seek the maximization of group welfare—that is, the sum of the members' welfare—even though another act would maximize one's own interest, at least in the short run. For each partner, her partner's behavior provides the context of her own behavior, with the following outcomes, ranked in descending order of preference from one to four:

Figure A

		B's STRATEGIES AND OUTCOMES	
		SELFISH	COOPERATIVE
A's STRATEGIES AND OUTCOMES	SELFISH	3 3	4 1
	COOPERATIVE	1 4	2 2

If both partners are cooperative (lower right cell), each has a higher outcome than if both are selfish (upper left cell). Each has her second best outcome rather than her third best. Cooperation generates more utility—a larger pie—to be distributed among the members of the partnership.<sup>31</sup> As long as the distribution is not so skewed as to leave one partner worse off than if she had gone it alone, it is rational for each partner to prefer cooperation to selfishness. However, if one partner is selfish and the other cooperative, the selfish partner will be even better off than under either mutual selfishness or mutual cooperation (lower left or upper right cells). She is better off because she benefits from the larger pie created by the other's cooperative behavior, and because she appropriates more of that pie for her own benefit. The cooperative partner is worse off than under a regime of mutual cooperation because her share in the benefits of cooperation is less. She may be even worse off than under a regime of mutual selfishness because her efforts could be focused on maximizing her own utility, but are instead directed toward improving the other's utility.

The best world for the individualistic utilitarian, then, is one in which she is the only selfish person among cooperative persons (lower left or upper right cells). But if the other members of the world are also rational—that is, maximizers of individual utility—they are going to prefer a selfish world (upper left) in which each will have a third-best outcome to a world in which they are coop-

31. D. GAUTHIER, *supra* note 26, at 274; J. RAWLS, *supra* note 26, at 4.



erative but their partners are selfish because then their outcome is the fourth best.

Of course, this analysis is repulsively cold-blooded and apparently psychologically unrealistic in the context of marriage. People marry because they love one another and desire to enhance the welfare of the other rather than simply a desire to use the other as an instrument to enhance their own welfare. Thus, a more attractive and apparently more realistic matrix of outcomes is the following:

Figure B

		B's STRATEGIES AND OUTCOMES	
		SELFISH	COOPERATIVE
A's STRATEGIES AND OUTCOMES	SELFISH	2 2	3 or 4 3 or 4
	COOPERATIVE	3 or 4 3 or 4	1 1

This matrix represents the positions of persons who love one another. For such persons, mutual cooperation (lower right) is the best outcome since they receive satisfaction not only from their own welfare but from the other's welfare also. As a distant second best, such persons would probably prefer a world of mutual selfishness (upper left) because at least neither would be taking advantage of the other. If, however, their behavior was not to be similar, but one was to be selfish and the other cooperative (lower left or upper right), it is difficult to determine which outcome would be preferable. Each might prefer to be the cooperative partner even though she was being taken advantage of by the other's selfishness because she would prefer not to betray the ideal of cooperation. On the other hand, she might decide that if someone was going to be taken advantage of, it was not going to be her. Therefore, she would prefer to be the selfish partner.

Having acknowledged the psychological truth of the second matrix, I want to return to the first because the prospective spouse actually confronts both matrices. The love that a prospective spouse feels for the other does not obliterate his own self-interest or his awareness of the mutability of all things, intimate relationships among them. The decision to marry under modern divorce rules is thus fraught with a tension that is captured in the dissonance of the two matrices.

The prospective spouse desires the well-being of the other for the other's

sake and not simply as an instrument of enhancing her own well-being; however, insofar as she is generally informed about human nature, she is aware that people are not entirely or constantly altruistic. She is also aware that creating a family is a project that involves more than the expression of mutual affection. Family projects, more specifically the rearing of children, may have a negative effect on the interspousal relationship insofar as they leave less time and energy for directly nurturing that relationship.<sup>32</sup> Moreover, spouses are likely to encounter role strain: the demands of their careers or jobs are in competition with their interpersonal needs and their roles as parents and domestic laborers.<sup>33</sup>

The rational person, then, more or less aware of all that has been discussed in the preceding paragraph, incorporates the first matrix into her decision making even though the second is her vision of the happy life. Some of the consequences of certain important decisions—whether to have children, how to integrate career or job and family—are independent of continuing affection between the spouses. Whether or not the spouses remain affectionate, the children will remain and family-influenced career or job decisions will have a lasting effect. The rational person will want to assess the risks associated with those long-term investments.

Two important applications of the first matrix occur in the context of marriage and divorce: one is the rationality of the division of labor between spouses; the other is the rationality of having children. For illustrative purposes, I will discuss the second here at some length. Insofar as each prospective spouse is rational and cognizant of the risk of marriage dissolution, she perceives as a real possibility that a time will come when either spouse may want to live with the children but apart from the other parent. Thus, each will say to herself, "I know that you are in love with A and that he is in love with you, but you have to face the fact that there are many other couples who have felt just the way you two do about one another, and then one partner has become dissatisfied with the marriage and has ended it. Assuming you become dissatisfied with your marriage at a time when you have children, what will you do about them? Will you have custody, or will he, or will you remain together so that you both can have custody? For each of us the best result may be to live with the children and apart from the other parent and the worst result to live apart from the children."

This result is shown in the upper right and lower left cells of the first matrix. One spouse has appropriated the fruits of the couple's cooperative venture—she is the one who continues to have daily contact with the children. The other spouse continues to cooperate in paying child support, even if unwillingly, but is left without significant contact with the children. If there is a real possibility of the worst result, it is rational to seek means to avoid it.

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32. Campbell, *The American Way of Mating: Marriage Si, Children Only Maybe*, PSYCHOLOGY TODAY, May 1975, at 37, 39 ("Almost as soon as a couple has kids, their happy bubble bursts. For both men and women, reports of happiness and satisfaction drop . . . , not to rise again significantly until their children are grown and about to leave the nest."); Levinger, *supra* note 24, at 40.

33. Hunt & Hunt, *The Duality of Careers and Families: New Integrations or New Polarizations*, 29 SOC. PROBS. 499 (1982); Moen & Dempster-McClain, *Employed Parents: Role Strain, Work Time and Preferences for Working Less*, 49 J. MARRIAGE & FAM. 579 (1987).

One rational solution is not to have children. The cost of that solution is obvious. Another rational solution is to agree to remain a unit so that each parent can continue to have daily contact with the children, even when one parent would prefer to live apart from the other. Many prospective parents would agree that this solution is preferable to one in which they do not have children.<sup>34</sup>

The problem presented to such persons by modern divorce law is that it fails to protect their decision to cooperate. Because either spouse can unilaterally obtain a no-fault divorce and possibly obtain custody of the children, the spouses may find themselves in the upper right or lower left cells of the first matrix. It is, therefore, rational for the spouses to protect their decision to cooperate by contracting out of the state's regime and into one that deters an attempt to move from the lower right to the upper right or lower left cells.

Arguably it is rational to risk the worst outcome (lower left or upper right cells) in order to have children at all or on the belief that the general high incidence of divorce does not apply to one's own relationship because characteristics of oneself and one's spouse give the relationship a much higher probability of permanence. But it is irrational to run the risk if it can be eliminated. Of course, the risk cannot be eliminated without cost. For example, by entering into a legally enforceable cooperative agreement one thereby expresses a doubt that she can rely on mutual affection, trust, and altruism to ensure cooperative behavior. The risk then is that the doubt undermines the mutual affection, trust, and altruism that do exist and would have continued to exist but for the expressed doubt. That is an undeniable risk of such an agreement, but it does not seem a dispositive one. It would be up to the prospective spouse to decide whether that risk outweighed the risk of not having the agreement.

To summarize, unless each partner can count on the other's cooperation, rational persons will choose a world in which everyone is selfish, even though they recognize that there exists the possibility of a cooperative world that is better for *everyone*, including themselves. Assuming the potential partners prefer a cooperative world, they are faced with the problem of providing sufficient protection against selfish betrayals of the cooperative world, so that a partnership may form and flourish.

I have focused on the problem of child custody to illustrate the application of the model of rational choice under an ethos of individualistic utilitarianism. Risks of substantial investment in a marital partnership under a unilateral no-fault divorce regime can be stated more generally, however. First, some of the value of the marital partnership is simply lost when the partnership dissolves.<sup>35</sup> The individuals no longer have the benefits, tangible and intangible, of cooperation. Second, some values produced during the marriage are not liquid, such as children, human capital, and foregone opportunities to invest in human capital.

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34. Of course, it is not necessary that they agree. For some, the prospect of having to live with someone when preferring not to do so will outweigh not having children. In this case, the second best choice is in the upper left cell rather than the lower right. But for many, the increased wealth brought about by cooperation (*viz.*, the children) will outweigh the loss of autonomy. For such persons, the first matrix represents their set of preferences.

35. See *infra* text accompanying notes 172-74.

Third, the liquid value of the marital partnership may not be sufficient to take into account disparities in the distribution of nonliquid assets, or it may be divided in a manner that underestimates inequities in the distribution of nonliquid assets.<sup>36</sup> For example, the spouse who does not obtain custody, instead of being compensated for that loss, is typically required to contribute substantially to the support of a household of which she is not a part.

To compound these problems, the fragility of marital partnerships under a unilateral no-fault divorce regime can easily be internalized. Thus the spouses act on the assumption that marriage is fragile, and because of those actions their marriage is more likely to be fragile. In other words, belief in fragility is a self-fulfilling prophecy. For example, in *A Treatise on the Family*, Gary Becker notes that marriages between persons of different religions or races are more likely to end in divorce, in part because the spouses expect them to be more likely to end in divorce.<sup>37</sup> If allegiance is tentative, there will be a restraint on investment. Because of the lower investment, the relationship is less valuable. Moreover, if the energy that would have been invested in the relationship is invested elsewhere, the opportunity cost of the marital relationship increases, thereby further increasing the probability of dissolution.

In sum, as a result of the protection afforded individual liberty by modern no-fault divorce, some spouses are in a worse position than they would have been under the more restrictive fault regime.<sup>38</sup> Furthermore, some families are in a worse position because of the new regime.<sup>39</sup> It is even arguable that the society as a whole is in a worse position under the new regime.<sup>40</sup>

Unilateral divorce may involve both a loss in value among the group of persons affected, and an inequitable distribution of the costs of divorce. Even assuming that there is a net gain to the divorcing spouse from the dissolution, the positions of divorced spouse and the children may worsen to an extent that more than offsets the gains of the divorcing spouse.<sup>41</sup> Further, even the divorc-

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36. L. WEITZMAN, *supra* note 16, at 184-214.

37. G. BECKER, *supra* note 24, at 224-25.

38. In economic terms, the move from a restrictive divorce law to one permitting pure unilateral no-fault divorce was not Pareto-superior. A Pareto-superior move is one in which no one is made worse off by the move and at least one person is made better off. R. DORFMAN, *PRICES AND MARKETS* 174 (3d ed. 1978) ("Pareto criterion"). Assuming there are no children, divorce is Pareto-superior when neither spouse is worse off because of the divorce. It is not Pareto-superior if one spouse is worse off, even if the other spouse is much better off.

39. Again, in economic terms, some divorces do not even exhibit Kaldor-Hicks efficiency. Kaldor-Hicks efficiency refers to the idea that the gain from the move offsets the loss. R. POSNER, *THE ECONOMICS OF JUSTICE* 91 (1983). Assuming there are no children, a divorce is Kaldor-Hicks efficient only if one spouse was made much better off even though the other spouse was slightly worse off. The former's gains would more than offset the latter's loss. A move that is Kaldor-Hicks efficient need not be Pareto-superior. See *supra* note 38.

40. See G. GILDER, *supra* note 14, at 16-17 ("The sense of social vitality and balance does not 'just happen.' In civilized conditions it is love, marriage, and the nurture of children that project a society into the future and make it responsible for posterity."); D. MOYNIHAN, *FAMILY AND NATION* 190-94 (1986) (suggesting causal relation between erosion of family and disintegration of larger society); Selznick, *supra* note 14, at 452.

41. Certain studies show a precipitous decline in the standard of living of divorced women with custody of children which persists as long as these women remain unmarried. Weiss, *The Impact of Marital Dissolution on Income and Consumption in Single-Parent Households*, 46 J. MARRIAGE &

ing spouse may be in a worse position as a result of wishful thinking: she may accurately assess the costs and benefits of her present situation but may overestimate the benefits and underestimate the costs of the alternative.<sup>42</sup>

The risks discussed above are inherent to entering a cooperative venture, not specific to the personalities and characters of the prospective partners. We can therefore assume that rational persons appreciate these risks and will reflect as follows: "We are contemplating entering into a cooperative venture—marriage. That venture has various risks. Better opportunities may become available for one or both of us. The venture may not produce the return we now expect. Perhaps, for example, children are going to be more costly in time and money and less satisfying than we now think. We are only willing to enter into such a momentous venture on the condition that it can be terminated only by mutual consent—in other words, each of us can veto termination—or by a serious breach of proper spousal behavior, such as abandonment, adultery or cruelty. We recognize that either of us may want to end the marriage, and that a rule of mutual consent or marital fault may frustrate that person's pursuit of utility maximization. However, we are more concerned about the loss of children, or being left without a career (or with an etiolated one), about weakness of will, overestimation of competing opportunities, and the failure to invest adequately in the partnership because of these other concerns. We do not feel that a nonbinding commitment is sufficient protection for these risks inherent to the marital partnership under modern law. Therefore, we wish to bind ourselves to a rule that says just as entry into marriage is only by mutual consent, so, too, exit from it is only by mutual consent, excepting of course, where there is marital fault." That is a rational position for a person to take under an ethic of individualistic utilitarianism.

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FAM. 115, 126 (1984); Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 UCLA L. REV. 1181, 1241-51 (1981). I am unaware of any studies attempting to discern whether there is a net gain in the sum of the welfare of all those directly involved in a divorce (i.e., spouses and children) even when the welfare of one or more of the individuals involved declines. Weitzman does note that both spouses experience a decline in real income. Weitzman, *supra*, at 1249. She claims that divorced men's standard of living increases 42% and divorced women's standard of living decreases 73%. *Id.* at 1251. Simply in monetary terms, therefore, divorce is not Kaldor-Hicks efficient. See *supra* note 39.

42. See D. GAUTHIER, *supra* note 26, at 185. An illustration of this phenomenon can be found in *Carter v. Carter*, 215 Va. 475, 211 S.E.2d 253 (1975).

The evidence shows that Edwin wished to continue the marriage, that Frances, expecting to marry another, had sought the divorce, but that after the divorce [in 1972] Edwin, and not Frances, had remarried. . . [In addition, Frances] expected to receive, and did receive, a Master's degree in School Psychology in order to qualify for a position in the public school system. . . The evidence shows that Frances became mentally ill and was hospitalized in August, 1972. . . Because of her recurring health problems, Frances was not employed in public education at the time of the hearing, but was employed in a lower salaried position as a proof reader for a publishing company.

*Id.* at 477-78, 211 S.E.2d at 256. The facts expressed by the court do not indicate whether Frances' mental illness was the result of the failure of her remarriage plans, but let us hypothesize that it was. When Frances decided to dissolve the marriage, she may have contemplated herself with a new husband, with a job as a school psychologist, and with custody of the children of her former marriage. She wound up with none of these things. Frances may have had terrible luck, but it is undeniable that what occurred was an inherent risk of her decision. What is doubtful is whether Frances adequately assessed that risk. Such an assessment may have caused her to increase her investment in her marriage to Edwin rather than to invest herself outside that marriage.

## II. THE CONTRACTUAL SOLUTION

The purpose of an antenuptial agreement responsive to the concerns raised in the previous section is the conversion of individual self-interest into group interest. Such a conversion consists of more than a promise to place marriage or family before self, but rather of mechanisms to channel self-interest so that it supports rather than undermines group interest. Such an agreement is not a panacea. Law, contractual or otherwise, is a fairly weak force, and other social forces are more likely to hold a marriage together.<sup>43</sup> The value of the contract is threefold. First, the agreement raises the consciousness of the participants about the nature of the act of entering a marital partnership. Second, it allocates marital goods such as wealth and children in a way that favors the spouse who wishes to continue the marriage. Third, the agreement may provide enough support for other cohesive social forces so that at the margin it makes a difference and preserves some marriages in which the total utility to the members is maximized by continuing rather than dissolving the marriage.

A. *Other Kinds of Antenuptial Agreements with Divorce Contingencies*

The agreement that I propose is not the only kind of marital agreement that is divorce-conscious. In the classic antenuptial agreement, the spouses simply affirm the separateness of their premarital property and provide that each partner's income during the marriage is also separate.<sup>44</sup> This agreement blends marriage with unmarried cohabitation in that unmarried cohabitants typically do not pool their assets and liabilities.<sup>45</sup> Such an agreement does not make sense for a marriage in which one of the spouses specializes in unpaid domestic labor and therefore does not invest in her own income-producing ability. This disinvestment need not be total. A person may perform some paid labor and make some investment in her income-producing ability but still do less than she would otherwise in order to perform domestic labor.<sup>46</sup> For example, a person may work as an attorney but not go out of town or work in the evening because of domestic obligations. If both spouses are not equally on call for household duties, then the spouse who bears the major responsibility for such duties is specializing in domestic labor. An antenuptial agreement providing that each spouse is entitled to only his or her own income inequitably ignores the diminished earnings and earning capacity of the spouse specializing in domestic production.<sup>47</sup>

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43. J. EEKELAAR, *FAMILY LAW AND SOCIAL POLICY* 44 (1st ed. 1978); M. RHEINSTEIN, *MARRIAGE STABILITY, DIVORCE, AND THE LAW* 284 (1972).

44. See, e.g., *Williams v. Williams*, 29 Ariz. 538, 243 P. 402 (1926); *Osborne v. Osborne*, 384 Mass. 591, 428 N.E.2d 810 (1981).

45. P. BLUMSTEIN & P. SCHWARTZ, *AMERICAN COUPLES* 109 (1983).

46. G. BECKER, *supra* note 24, at 21-32 (discussing division of labor in households and families); Berardo, Sheham & Leslie, *A Residue of Tradition: Jobs, Careers, and Spouses' Time in Housework*, 49 J. MARRIAGE & FAM. 381 (1987); Hunt & Hunt, *supra* note 33; Moen & Dempster-McClain, *supra* note 33, at 588 (in two-earner families, mother typically reduces work schedule outside home).

47. Two commentators have noted the effect of this on the wife:

Women in the work force thus contended with greater physical and emotional distractions from their occupations than did their male counterparts. It is clear from the present find-

Thus the classic, or cohabitation-like, antenuptial agreement is simple but unresponsive to the complexities of many marriages. When antenuptial agreements are drafted to take account of unpaid domestic labor, however, other difficulties arise. One approach is to avoid domestic specialization; both spouses are expected to perform equal amounts of domestic labor, and the antenuptial agreement sets forth domestic duties. Although such provisions may be very useful for spousal negotiations in an ongoing marriage, they are not legally enforceable,<sup>48</sup> nor can women rely on such promises with much confidence.<sup>49</sup>

In cases in which the contract anticipates specialization in domestic labor, the contract may be excessively rigid and one-sided. Consider one of the agreements in Weitzman's *The Marriage Contract*.<sup>50</sup> According to the hypothetical facts, David is a medical student and Nancy is an aspiring dancer, the kind of career that cannot be put on hold. Nancy agrees to forego the possibility of that career to become David's wife. She is to take a job in order to finance his professional training and thereafter become a full-time housewife and, sometime later, mother. Their antenuptial agreement is designed to protect Nancy from the risks she has incurred in not pursuing a career that would presumably give her satisfaction and income.

The agreement contains the following provisions, among others:

— Nancy will work as a secretary in order to support David until he has finished medical school and an internship.

— Nancy will not work outside the home after David's career has commenced.

— Nancy agrees to participate actively in church and country club activities, to serve on medical auxiliary and hospital benefit committees, and to socialize with David's colleagues and other physicians.

— Children will be postponed until David's education is completed.

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ings as well that men did not respond to the disadvantaged position of women in the work force between 1965 and 1975. Indeed, while men decreased their paid-work time during that period, they devoted the gained time not to domestic work but to leisure activities.

Coverman & Sheley, *Change in Men's Housework and Child-Care Time, 1965-1975*, 48 J. MARRIAGE & FAM. 413, 420 (1986); see also Berardo, Shehan & Leslie, *supra* note 46 at 388 ("Dual-career wives while devoting less than half the number of hours that full-time housewives devote . . . still spent nearly three times as many hours doing housework each week as their husbands."); Moen & Dempster-McClain, *supra* note 33 at 585 (majority of mothers prefer to work fewer hours in order to have more time with family; husbands typically want wives to work fewer hours to devote more time to family).

48. There is a long-standing reluctance on the part of the state to resolve spousal disputes in ongoing marriages. *Kilgrow v. Kilgrow*, 268 Ala. 475, 107 So. 2d 885 (1959) (child's education); *McGuire v. McGuire*, 157 Neb. 226, 59 N.W.2d 336 (1953) (amount of support). This reluctance extends to contracts between the spouses. *Lacks v. Lacks*, 12 N.Y.2d 268, 189 N.E.2d 487, 238 N.Y.S.2d 949 (1963) (contract to pay spouse certain amount during marriage in lieu of support and maintenance void); Friedman, *The Parental Right to Control the Religious Education of a Child*, 29 HARV. L. REV. 485, 492 (1916) (agreement between parents regarding religious education of their children unenforceable). For criticism of this tradition, see Schultz, *supra* note 10, at 319-28.

49. See, e.g., Moen & Dempster-McClain, *supra* note 33, at 585; Berardo, Shehan & Leslie, *supra* note 46, at 390.

50. L. WEITZMAN, *supra* note 10, at 295-99.

— If Nancy should become pregnant prior to that time, she will have an abortion.

— This partnership may be dissolved by either party, at will, upon six months notice to the other party.

— David agrees to pay Nancy the fixed sum of \$50,000 if their marriage terminates within 15 years, as liquidated damages for the pain and suffering she will experience from the change in her expectations and life plans.

— If there are children, Nancy will have custody of the children. David will have full responsibility for their support, as well as the responsibility for compensating Nancy for her services in caring for them (at the then current rate for private nurses). Suitable visiting arrangements will be made.<sup>51</sup>

There are other provisions that have been omitted, but there is nothing in them that in any way changes the character of the agreement from that indicated by the quoted provisions. The couple has locked into a certain vision of their future. It is sensible to have such visions and even to work them out in some detail, but to attempt to turn them into legal rights and obligations will probably be either simplistic or psychologically unrealistic.

Here we have an aspiring dancer—an additional fact is that she is good enough to have won a two-year fellowship for a special training program in Paris—who agrees to work as a secretary for the next four or five years.<sup>52</sup> Now it is psychologically plausible that both Nancy and David would believe in this vision under the spell of romance, but that such a vision would persist during the period Nancy works as a secretary is more doubtful. What happens if Nancy wants to give up the sedentary secretarial life and return to the gambols of dance? That would breach the agreement, would it not? But what can David do about it? In fact, may Nancy not simply terminate the agreement at any time—including the first year of marriage—and collect \$50,000 for the one-year hiatus in her dance career? It would seem that the prospective spouses were not considering this possibility when they entered the agreement. They seem to have in mind the problem of David jettisoning Nancy after he has begun, or is just about to begin, his (presumably) lucrative career and effectively prevented her from pursuing hers. But the terms of the agreement would equally apply if Nancy tired of her doctor, divorced him, and married another dancer. She would still be entitled to the \$50,000, custody of the children, and, under a provision not quoted above, “one-fourth of his net yearly income, to be paid quarterly, for as long as he continues to practice medicine . . . regardless of her earning capacity or remarriage.”<sup>53</sup> Can David really be knowingly assuming this risk?

Picking apart this agreement—and I will pass over the church-and-country-club-activities and no-abortion clauses—is not just a lawyer’s exercise. My purpose is to show the rigidity and one-sidedness in it because I think they are

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51. L. WEITZMAN, *supra* note 10, at 297-99.

52. L. WEITZMAN, *supra* note 10, at 295.

53. L. WEITZMAN, *supra* note 10, at 299.



endemic problems of writing such an agreement. If one were to attempt to cure them with more specific and carefully considered provisions, the agreement would quickly become psychologically unrealistic. What if Nancy becomes pregnant while David is in medical school, the child is born, she stays home to care for it, David works in the summer, and his parents help them out? Is Nancy still entitled to the one-quarter interest in David's future earnings? Can that not implausible set of contingencies be worked into the agreement? Would it eliminate her interest in his earnings or reduce it to one-eighth or some other fraction? Or would it permit David to rescind the agreement?

Antenuptial agreements, therefore, present a dilemma of sorts. If they are kept very simple—"you keep what's yours and I'll keep what's mine"—they do not address the situations in which there is significant specialization and reliance, which may turn out to be detrimental, on the continuation of the marital relationship. If an agreement does attempt to address the complexities of marital interaction, it may become so complex and confront the prospective spouses with so many disagreeable possibilities that they will give up the project—the agreement or the marriage, take your pick.

#### B. *A Contract with Divorce Restrictions—Goals and Mechanisms*

The Appendix to this Article contains an annotated antenuptial agreement (hereinafter referred to as the Model Agreement) that attempts to diminish the risks of divorce to the parties. The Model Agreement does not contain provisions regarding the ongoing marital relationship, leaving the spouses to work out nonbinding arrangements as they run the courses of their lives together. Instead, the agreement focuses on the key problem of investment in the marital relationship. As noted above, because of the ease of terminating that relationship, it is rational to hedge one's bets, to limit and to spread one's investment.<sup>54</sup> But that very response makes the marital investment less attractive because it increases the probability that the marriage will be terminated. The solution worked out in the Model Agreement is to restrict divorce through two mechanisms, which may be used in conjunction or in the alternative. The Model Agreement bars divorce except in circumstances covered by the traditional fault grounds of abandonment, adultery, or cruelty.<sup>55</sup> It also burdens the divorce decision by raising the costs of divorce to a spouse who obtains a unilateral no-fault divorce.<sup>56</sup> These increased costs include an unfavorable division of family property;<sup>57</sup> unfavorable division of family income, including postdivorce family income;<sup>58</sup> and the loss of child custody.<sup>59</sup>

As to the division of property under the Model Agreement, the divorced spouse receives half of that portion of the net value of the divorcing spouse's

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54. See *supra* text accompanying notes 24-42.

55. Model Agreement, para. 5.

56. *Id.* at para. 6.

57. *Id.* at para. 6(2).

58. *Id.* at para. 6(3).

59. *Id.* at para. 6(1).

commercial or professional goodwill, licenses, or degrees developed or earned during the marriage, but the divorcing spouse is not entitled to share in any similar assets of the divorced spouse.<sup>60</sup> The remainder of the family's property—including the separate property of the divorcing spouse but not that of the divorced spouse—is divided seventy-five percent to twenty-five percent in favor of the divorced spouse, up to the point that the family property equals twice the family's annual income.<sup>61</sup> Thereafter, only marital property is divided, and on a fifty-fifty basis. Future income is also unequally divided, with the divorced spouse being entitled to sixty percent of the spouse's total income until the divorced spouse remarries or enters into a marriage-like arrangement.<sup>62</sup> Finally, child custody is awarded to the divorced spouse unless it can be shown clearly and convincingly that such placement is seriously detrimental to the children.<sup>63</sup>

The imposition of these costs serves two purposes: first, to protect the spouse who does not wish a divorce from the loss of property, income, and children; and second, to deter the potential divorcing spouse from obtaining a divorce by making the costs of divorce clear to the spouses from the outset. This would provide an incentive to each spouse to continue to invest in the well-being of her marital relationship. Indeed, the goal of both approaches—bar as well as burden—is to provide the spouses with incentives to invest in the marital relationship, thereby preventing some divorces from occurring. The goal is not to prevent all divorces. Neither approach prevents divorces to which the spouses agree. They remain free to rescind the agreement and thus reinstate the background law of divorce.<sup>64</sup> Nor does either approach prevent divorces when one spouse is at fault.<sup>65</sup> Only those divorces in which one spouse neither consents nor is at fault are barred or deterred by this approach.

### C. *Application of the Model Approach to the Nancy and David Hypothetical*

The Nancy and David hypothetical provides a useful test for the Model Agreement. First, assume that David seeks a pure no-fault divorce from Nancy. Under the agreement, such a divorce is barred. Nancy could offer to rescind the contract on terms such as those set out in the antenuptial agreement above: a payment of \$50,000 and a one-quarter interest in David's earnings. Either spouse might seek a financial package more favorable to him or her than this one. If David breaks off negotiations and simply leaves, he is guilty of abandonment, and Nancy is entitled to a fault divorce and to the financial provisions set out in the Model Agreement.

Similarly, if David obtains a unilateral no-fault divorce because a court refuses to enforce the provision barring such divorces, Nancy is entitled to the greater share of the family's goods. First, she is entitled to fifty percent of the

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60. *Id.* at para. 6(2)(a) & (b).

61. *Id.* at para. 6(2)(c).

62. *Id.* at para. 6(3).

63. *Id.* at para. 6(1).

64. *Id.* at para. 10.

65. *Id.* at paras. 7-8.

value of David's professional goodwill, license, or degree. He, on the other hand, as the divorcing spouse is not entitled to share in these intangibles if Nancy has them. Thus, Nancy is entitled to a substantial amount regardless of whether David divorces her immediately after graduating from medical school or after establishing his practice. Second, she is entitled to seventy-five percent of spousal property, which includes marital property and David's separate property but not her own separate property, up to twice the family's annual income. How she fares under this provision depends on when David seeks the divorce—if during medical school or shortly thereafter, there will be little property and a small income relative to the potential income from his expected medical practice. Third, she is entitled to support. This right differs from traditional alimony in that it is not limited by the marital standard of living.

Now assume it is Nancy who seeks a pure no-fault divorce from David. Once again, the divorce is barred under the Agreement, but David and Nancy may agree to rescind the agreement on mutually acceptable terms. David is protected from the possibility under the other agreement of losing his children, \$50,000, and one-quarter of his income when Nancy obtains a pure no-fault divorce.

Should Nancy obtain the no-fault divorce, David would be entitled to seventy-five percent of the marital property and Nancy's separate property up to twice the couple's annual income. Further, he would be entitled to sixty percent of their combined annual income. Assuming that David is the wealthier of the two spouses, these provisions would probably not involve any transfers to him from Nancy; however, he would not be required to make transfers to her when she has obtained a unilateral no-fault divorce.

In comparing the two agreements, Nancy does not seem to fare worse under our contract than under the apparently more tailored contract examined above.<sup>66</sup> Under both she obtains compensation for being divorced. David, on the other hand, fares better and is not exposed to the loss of wealth and children when it is Nancy who obtains a unilateral no-fault divorce. Thus, the Model Agreement is superior in that it treats the spouses equitably.

Another significant difference between the two agreements is that the Model Agreement expressly restricts divorce, either by bar or burden, whereas the other contract does not. Both spouses have given up the right to a pure unilateral no-fault divorce although neither agreement locks the spouses into a marriage they both would rather terminate as did the old fault divorce law. David and Nancy may not want such an arrangement, but it must be recognized that their existing agreement does burden David's decision to divorce Nancy. Their existing agreement is to some extent a nonreciprocal version of the Model Agreement. Further, they may modify the Model Agreement to make it more like a reciprocal version of their existing agreement by eliminating the bar (paragraph 5).

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66. See *supra* text accompanying notes 50-53.

## III. CONSTITUTIONAL LIMITATIONS

Until twenty-five years ago, the *United States Reports* were virtually devoid of marriage-and-divorce caselaw, apart from its jurisdiction-and-conflicts side-show.<sup>67</sup> Since then, constitutionally guaranteed individual rights to marry<sup>68</sup> and divorce<sup>69</sup> have been recognized and now there is a constitutional aspect to every governmental regulation of those two socio-legal rites of passage. Indeed, some scholars have argued for a constitutional right to a unilateral no-fault divorce.<sup>70</sup> Should such a right exist, contracts alienating it would be of doubtful validity.<sup>71</sup>

The argument for such a constitutional right is as follows: (1) There is a fundamental right to marry under *Zablocki v. Redhail*;<sup>72</sup> (2) the right to divorce is as important as the right to marry under *Boddie v. Connecticut*;<sup>73</sup> (3) therefore, there is a fundamental right to divorce. Neither premise is justified by the decided cases, however. As to the fundamental nature of marriage, it is a phrase with more rhetorical sonority than operational significance. In other cases involving fundamental rights, the laws or regulations restricting these rights have been subjected to the withering gaze of strict scrutiny;<sup>74</sup> but the Court has applied the weaker, intermediate level of scrutiny to marriage restrictions even when referring to it as a fundamental right.<sup>75</sup> To be sure, marriage restrictions do require a greater degree of justification than do restrictions on other interests, but the Court has been careful not to commit itself to a position that would leave

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67. Over the course of more than a century, the United States Supreme Court has decided many cases arising under the due process and full faith and credit clauses. *See, e.g.,* *Simons v. Miami Beach First Nat'l Bank*, 381 U.S. 81 (1965); *Barber v. Barber*, 62 U.S. (21 How.) 582 (1858). *See, Rodgers & Rodgers, The Disparity Between Due Process and Full Faith and Credit: The Problem of the Somewhere Wife*, 67 COLUM. L. REV. 1363 (1967). Although many of these lawsuits arose ultimately from forum shopping, the Court did not address the substantive law that motivated the choice of forum.

I could not say *entirely* devoid because of *Reynolds v. United States*, 98 U.S. 145 (1878), in which the Court upheld the constitutionality of a statute prohibiting polygamy as consistent with the Constitutional guarantee of the free exercise of religion.

68. *Turner v. Safley*, 107 S. Ct. 2254 (1987) (marriage by prisoners); *Zablocki v. Redhail*, 434 U.S. 374 (1978) (marriage by persons with unpaid child support obligations); *Loving v. Virginia*, 388 U.S. 1 (1967) (antimiscegenation laws).

69. *Boddie v. Connecticut*, 401 U.S. 371 (1971) (divorce by persons unable to pay court fees and costs).

70. *See Jones, The Rights to Marry and Divorce: A New Look at Some Unanswered Questions*, 63 WASH. U.L.Q. 577 (1985); *Karst, The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980).

71. Because the Constitution restricts governmental rather than individual action, at issue is whether contractual restrictions on divorce implicate governmental action sufficiently that the enforcement of these restrictions amounts to a constitutionally cognizable claim. The answer to this vexed question substantially depends on the source of the right. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 18.6, at 1714-15 (2d ed. 1988). If the right to a unilateral no-fault divorce is not part of the constitutional guarantee of substantive due process, then there is little likelihood that the enforcement of the Model Agreement constitutes state action. But if the right to a unilateral no-fault divorce is part of the constitutional guarantee of substantive due process, there is a greater probability that enforcement of the Agreement constitutes state action. *Id.*

72. 434 U.S. 374 (1978).

73. 401 U.S. 371 (1971).

74. *See* L. TRIBE, *supra* note 71, § 16-6 at 1451; *Gunther, The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

75. *Zablocki*, 434 U.S. at 386; *see Turner v. Safley*, 107 S. Ct. 2254, 2266 (1987) (striking down statute on reasonable relationship test).

the states with virtually no authority to restrict marriage.<sup>76</sup> Instead, the Court has put marriage in a middle category. Marriage restrictions must be supported by articulated, legitimate reasons.

Even assuming divorce has a constitutional stature equal to that of marriage, the divorce restrictions of the Model Agreement can be supported by articulated, legitimate reasons. In the first part of this Article I have shown that it is rational for persons entering into marriage to limit termination of the relationship in order both to encourage investment in the family and to protect those investments once made.<sup>77</sup> These goals have been approved under both state law and federal constitutional law.<sup>78</sup> Nor are these limitations imposed on unwilling persons, as in the cases involving restrictions on interracial couples,<sup>79</sup> indigents,<sup>80</sup> and prisoners.<sup>81</sup> The state is merely enforcing a marital regime that the spouses have themselves specifically agreed to. Moreover, the spouses retain the right to rescind the Agreement by mutual consent. In addition, divorce restrictions have been traditional in American and European culture,<sup>82</sup> and the Court has acknowledged its deference to traditional restrictions.<sup>83</sup> Although no-fault divorce now exists in all states, it is largely a phenomenon of the last quarter century, which even by American standards cannot be fairly characterized as traditional. Divorce restrictions can hardly be called "totally unprecedented,"<sup>84</sup> and are more likely to be viewed as exemplifying traditional family values. The legal means to strengthen the marital tie are also narrowly tailored in that they are focused on making the tie more difficult to sever without absolutely barring divorce. Therefore, even if the second premise is granted, an inalienable right to unilateral no-fault divorce cannot be derived from the cases characterizing marriage as a fundamental right.

Moreover, the second premise need not be granted because the Supreme Court's divorce cases do not support the claim that the right of divorce is equal to the right of marriage. Although the Court's marriage cases have struck down substantive restrictions on marriage, its divorce cases have not dealt with substantive restrictions, nor have they implied that substantive restrictions on di-

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76. Justice Powell expressed the concern that the use of the strict scrutiny test would largely deprive the states of their traditional—and in his view, proper—power to regulate marriage. *Zablocki*, 434 U.S. at 397-99 (Powell, J., concurring).

77. See *supra* text accompanying notes 25-42.

78. *Zablocki*, 434 U.S. at 384 (quoting with approval *Maynard v. Hill*, 125 U.S. 190, 205, 211 (1888) (marriage is "the most important relation in life" and "the foundation of family and of society, without which there would be neither civilization nor progress"); *Gant v. Gant*, 329 S.E.2d 106, 112-13 (W. Va. 1985) (upholding antenuptial agreement with divorce contingency on ground that for some couples such agreements encourage marriage rather than unmarried cohabitation).

79. *Loving v. Virginia*, 388 U.S. 1 (1967).

80. *Zablocki*, 434 U.S. at 374.

81. *Turner v. Safley*, 107 S. Ct. 2254 (1987).

82. See generally M. RHEINSTEIN, *MARRIAGE STABILITY, DIVORCE, AND THE LAW* (1972) (history of divorce in United States).

83. *Bowers v. Hardwick*, 106 S. Ct. 2841, 2844 (1986); *id.* at 2847 (Burger, C.J., concurring); see *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972); *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion by Powell, J.).

84. *Zablocki*, 434 U.S. at 404 (Stevens, J., concurring).

orce are open to attack. In *Boddie v. Connecticut*,<sup>85</sup> the case which purportedly provides authority for the claim that the right to divorce has the same constitutional stature as the right to marry, plaintiffs challenged various court costs in a divorce action as violative of their due process rights. They claimed that because of their indigency the imposition of such costs effectively barred them from obtaining divorces. The Court held this bar denied the plaintiffs due process chiefly because divorce was thereby not equally available to rich and poor.<sup>86</sup>

Although acknowledging the fundamental importance of marriage and divorce to individuals,<sup>87</sup> Justice Harlan, writing for the majority, emphasized almost exclusively the state's monopoly on divorce.<sup>88</sup> Although the availability of the courts may be of great significance to other legal relationships, the parties typically have the authority to adjust their relationship by agreement. They may settle a claim, adjust a debt, or rescind a contract. Not so with divorce; use of the courts is a legal necessity.<sup>89</sup> The Court did not suggest that the state must provide a divorce to anyone who finds her marriage untenable. The Court held only that the state may not "pre-empt the right to dissolve this legal relationship without affording all citizens access to the means it has prescribed for doing so."<sup>90</sup> *Boddie* did not question that basic preemption—that is, permitting dissolution only on grounds acceptable to the state.

In *Sosna v. Iowa*<sup>91</sup> the Court dealt with another procedural aspect of divorce, a one-year residency requirement. The Court did not give divorce an elevated constitutional status, but upheld the statute on the weak rational relation test, even though the case involved not only the interest in divorce but the interest in interstate travel. The latter has been explicitly granted a privileged constitutional status in other contexts, such as the interests of new residents in voting, welfare, and medical care.<sup>92</sup> Even the dissent did not raise doubts about substantive restrictions on divorce. Justice Marshall admonished that "the State's regulation [of divorce] be evenhanded,"<sup>93</sup> and, in particular, that divorce not be denied to new residents of a state when it is made available to those who have resided there longer.<sup>94</sup> Nothing in his opinion suggests that Justice Marshall would find unconstitutional a provision that required persons to have been separated for a year before they could file for divorce, or that limited divorce grounds to mutual consent or fault.

Thus neither *Boddie* nor *Sosna* provides a basis for asserting that divorce has a constitutional stature equal to marriage. Even if the state were not entitled to restrict marriage, there is nothing in the Court's marriage and divorce cases to

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85. 401 U.S. 371 (1971).

86. *Id.* at 383.

87. *Id.*

88. *Id.* at 376.

89. *Id.* at 376-77.

90. *Id.* at 383.

91. 419 U.S. 393 (1975).

92. *Memorial Hosp. v. Maricopa County*, 415 U.S. 250 (1974) (medical care); *Dunn v. Blumstein*, 405 U.S. 330 (1972) (voting); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (welfare benefits).

93. *Sosna*, 419 U.S. at 423 (Marshall, J., dissenting) (footnote omitted).

94. *Id.* at 423 n.3 (Marshall, J., dissenting).

undermine the state's ability to define marriage so as to exclude termination by unilateral no-fault divorce. In sum, neither premise of the argument for a constitutionally guaranteed inalienable right to unilateral no-fault divorce is supported by the cases. In addition, general concerns about nationalizing and, indeed, constitutionalizing the law,<sup>95</sup> especially an area of law that has traditionally been a matter of state regulation,<sup>96</sup> militate against the creation of such a right.

#### IV. CONTRACT LAW LIMITATIONS

The other general basis for attacking contractual restrictions on divorce is that, as a matter of contract law, such restrictions are void as against public policy. Although there is a dearth of cases directly on point, there is a substantial body of case law involving antenuptial agreements, and there are cases on other, analogous kinds of contracts that shed light on the problem.

##### A. *The Covenant Not to Sue for Divorce*

By the terms of the Model Agreement, if one of the spouses files for divorce, the other is entitled to have the divorce action dismissed on the basis of the covenant not to sue. There is only one appellate case nearly on point. In *Towles v. Towles*<sup>97</sup> the spouses entered into a reconciliation agreement whereby the wife promised that she would "‘never again bring any suit at law or in equity’" against the husband.<sup>98</sup> She thereafter brought an action for support, and he sought to have it dismissed on the basis of the reconciliation agreement. The South Carolina Supreme Court held the agreement void as against public policy insofar as it precluded her from enforcing a right granted her by the state.<sup>99</sup>

Accepting *Towles* as good law, it is distinguishable from cases arising under the Model Agreement. First, the Model Agreement is not absolute: it does not, as the *Towles*'s agreement did, preclude a spouse from bringing any action against the other. Indeed, it does not preclude her from bringing a divorce action if she is able to show abandonment, adultery, or cruelty. Second, the Model Agreement is not one-sided: it does not preclude just the wife, as the *Towles*'s agreement did, or just the husband from obtaining a pure unilateral no-fault divorce; it precludes both.

The heart of the *Towles* opinion was that the parties could not contract out

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95. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (lauding federal system as permitting states to serve as laboratories "try[ing] novel social and economic experiments without risk to the rest of the country"); see Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1210-11 (1977) (setting out various utilitarian and nonutilitarian values served by local rather than central governmental control).

96. *Bowers v. Hardwick*, 106 S. Ct. 2841, 2843 (1986); *Zablocki v. Redhail*, 434 U.S. 374, 398 (1978) (Powell, J., concurring) ("In my view, analysis must start from the recognition of domestic relations as 'an area that has long been regarded as a virtually exclusive province of the States.' *Sosna v. Iowa*, 419 U.S. 393, 404 (1975).").

97. 256 S.C. 307, 182 S.E.2d 53 (1971).

98. *Id.* at 310, 182 S.E.2d at 54 (quoting from the spouses' agreement).

99. *Id.* at 311-12, 182 S.E.2d at 55.

of their marital obligations, more particularly the husband's obligation to support his wife. But neither does the Model Agreement permit the parties to contract out of their obligations. A refusal by a supporting spouse to support a dependent spouse would amount to cruelty, and thus permit the dependent spouse to obtain a divorce under the agreement. Thus, the one decided appellate case does not imply that the covenant not to sue for divorce contained in the Model Agreement is invalid.

### 1. Covenants Not to Sue in Tort

Although courts are, in general, chary of enforcing contractual provisions calling for specific performance,<sup>100</sup> covenants not to sue are special because they require the promisor to *refrain* from doing something. That something, moreover, is pursuing a lawsuit. Not only are courts more willing to order someone not to do something than the reverse,<sup>101</sup> but it is fully within the power of the court to effectuate its decision by dismissing the plaintiff's case.

Covenants not to sue are sometimes raised in tort cases, and courts generally give them effect short of cases of intentional wrongdoing.<sup>102</sup> By analogy, short of cases involving serious marital fault—abandonment, adultery, cruelty—the spouses should be permitted to contract out of their right to use the courts to remedy by divorce lesser, albeit real, grievances. Freedom to contract can, however, be overridden by the public interest.<sup>103</sup> The state has traditionally asserted a strong public interest in the alienability of marital rights and obligations, but the liberalization of the divorce laws signals a fundamental change in this regard. That strong public interest has atrophied, replaced by the view that marriage is primarily the spouses' affair, a "bilateral loyalty."<sup>104</sup> The liberalization of divorce laws represents the state's withdrawal from its traditional role as the third (and dominant) party to the marriage contract. It does not represent the state's insistence, *as the third party*, that the marriage be terminated when one of the spouses unilaterally decides that it should be. Although the state no longer prohibits divorce when both spouses or even only one wants a divorce, it does not follow that the state should interfere when the spouses have made another, more restrictive arrangement. Hence, the covenant not to sue for divorce should be given effect.

There is, however, a notable difference between a covenant not to sue for negligence and a covenant not to sue for divorce. The usual result of the former is that the parties go their separate ways with no further involvement between them, whereas the result of the latter is that the parties remain locked in a rela-

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100. Macneil, *Power of Contract and Agreed Remedies*, 47 CORNELL L.Q. 495, 520-23 (1962).

101. 5A A. CORBIN, CORBIN ON CONTRACTS § 1137, at 102 & n.16 (1964).

102. *Jefferson County Bank v. Armored Motor Serv.*, 148 Colo. 343, 366 P.2d 134 (1961); *Cash v. Street & Trail, Inc.*, 136 Ga. App. 462, 221 S.E.2d 640 (1975); RESTATEMENT (SECOND) OF CONTRACTS § 195 (1) comment a (1979) ("[A] party to a contract can ordinarily exempt himself from liability for harm caused by his failure to observe the standard of reasonable care imposed by the law of negligence.").

103. *Tunkl v. Regents of University of California*, 60 Cal. 2d 92, 383 P.2d 441, 32 Cal. Rptr. 33 (1963); RESTATEMENT (SECOND) OF CONTRACTS § 195 (2)(b) illustration 1 (1979).

104. *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).



tionship that one of them wants to end. For guidance on that aspect of the problem, it is helpful to consider negative covenants and partnerships for a term. These situations resemble contractual restrictions on divorce because the parties have agreed that their relationship will have especially strong legal bonds.

## 2. Personal Service Contracts with Negative Covenants and Partnerships for a Term

There have long been attempts to impose contractual restrictions on the terminability of personal relationships other than the marital relationship, such as those governed by personal service and partnership contracts. Personal service contracts sometimes contain a negative covenant whereby the promisor agrees not to perform for another during the term of the contract.<sup>105</sup> Contractual bars to divorce are analogous in that the spouse raising the contract is seeking to hold the other spouse to her promise *not* to do something—not to seek a divorce—rather than to compel her to interact affectionately with her spouse.

As to the partnership analogy, absent an agreement to the contrary, each member of a business partnership has the right to dissolve the partnership at will.<sup>106</sup> Thus, a business partnership is analogous to modern marriage in which each spouse has the right to dissolve at will. Partnership agreements may, however, include a provision establishing a specific duration for the partnership—a term of years, the completion of a project, or, like traditional marriage, the joint lifetime of the partners—which thereby extinguishes the right to dissolve the relationship at will.

Inevitably, cases arise in which the promisor desires to perform for another while the negative covenant is in effect or the business partner desires to dissolve the partnership before the expiration of the term. The courts have accorded great weight to personal freedom in these cases. They have refused to enforce personal service contracts by specific performance<sup>107</sup> and have been reluctant, but not entirely unwilling, to check the exercise of personal freedom with an injunction.<sup>108</sup> However, in the leading case, *Lumley v. Wagner*,<sup>109</sup> the Lord Chancellor did enforce a negative covenant by enjoining the defendant from performing a contract that she had entered into in violation of the negative covenant in her contract with the plaintiff. At the heart of the Lord Chancellor's opinion was his belief that the willingness of the English courts to use the injunctive remedy "had a wholesome tendency towards the maintenance of that good faith [in contractual relations] which exists in this country to a much greater

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105. *E.g.*, *Philadelphia Ball Club, Ltd. v. Lajoie*, 202 Pa. 210, 51 A. 973 (1902); *Lumley v. Wagner*, 42 Eng. Rep. 687 (Ch. 1852).

106. UNIF. PARTNERSHIP ACT § 31(1)(b), 6 U.L.A. 376 (1914); PARTNERSHIP ACT OF 1890 (U.K.) § 32(c).

107. *Lumley v. Wagner*, 42 Eng. Rep. 687 (Ch. 1852); 5A A. CORBIN, *supra* note 101, § 1204, at 398.

108. *Philadelphia Ball Club, Ltd. v. Lajoie*, 202 Pa. 210, 51 A. 973 (1902); *Lumley v. Wagner*, 42 Eng. Rep. 687 (Ch. 1852); 5A A. CORBIN, *supra* note 101, §§ 1204-09.

109. 42 Eng. Rep. 687 (Ch. 1852).

degree perhaps than in any other."<sup>110</sup> Although the Lord Chancellor stated that he was not effectively ordering the defendant to perform her contract with the plaintiff, he was not overly concerned about restricting her personal freedom nor about the possibility that she might choose to sing for Lumley after all.<sup>111</sup>

Courts and commentators more solicitous of the personal freedom of contractors have taken a restrictive view of *Lumley v. Wagner*. Generally it has been confined to situations in which the breaching party would perform for a competitor of the promisee.

This line of cases raises serious doubts about the efficacy of contractual bars to divorce. Although *Lumley* establishes the viability of the specific performance remedy for a negative covenant, our context does not present the salient features of that rather closely confined category. Unless the party asserting the divorce restriction could show that the other spouse was seeking the divorce in order to marry a particular person, the requirement of competition would not be met. Even if such a rival existed, the abolition in most jurisdictions of the alienation of affections action suggests that the presence of such competition would be given no weight in deciding whether to enforce the contractual restriction on divorce. Further, the marital relationship is a fiduciary one. A court would be reluctant to bar a party from severing a fiduciary relation once the necessary trust and confidence were gone.<sup>112</sup>

Partnership law points to a similar conclusion. Under the Uniform Partnership Act, even when the partners have agreed to continue the partnership for a specific duration, each partner retains the power to dissolve the partnership at will.<sup>113</sup> Such an action is not without adverse legal consequences to the breaching partner,<sup>114</sup> but his power to dissolve is inalienable.<sup>115</sup> In addition, a business partner may petition a court to dissolve a partnership prior to the expiration of its term for various reasons, including "no fault" reasons.<sup>116</sup>

The dissolution of the marital relationship always requires a judicial act, whereas the dissolution of a business partnership may always be effected by the unilateral act of a member. The question for the court in our situation would be

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110. *Id.* at 693.

111. The Lord Chancellor stated that Ms. Wagner "has no cause of complaint if I compel her to abstain from the commission of an act which she has bound herself not to do, and thus possibly cause her to fulfil her engagement." *Id.*

112. *Page One Records, Ltd. v. Britton*, 3 All E.R. 822 (1967).

113. UNIF. PARTNERSHIP ACT § 31(2), 6 U.L.A. 376 (1914).

114. He may be liable to the remaining partners for damages caused by his breach. *Id.* § 38(2)(a)II, 6 U.L.A. at 456. The remaining partners may continue the business without liquidation, *id.* § 38(2)(b), 6 U.L.A. at 456, and if they continue the business, the withdrawing partner's proportionate share of the business does not include goodwill. *Id.* § 38(2)(c)II, 6 U.L.A. at 456-57; see Hillman, *The Dissatisfied Participant in the Solvent Business Venture: A Consideration of the Relative Permanence of Partnerships and Close Corporations*, 67 MINN. L. REV. 1, 11-14 (1982).

115. Under the English Partnership Act of 1890, however, an agreement that the partnership is to be terminated "by mutual agreement only" will be enforced and will prevent termination at the will of a single partner. See *Moss v. Elphick*, 1 K.B. 846 (1910). See generally A. UNDERHILL, *PRINCIPLES OF THE LAW OF PARTNERSHIP* 30 (10th ed. 1975) (treatise on English partnership law).

116. UNIF. PARTNERSHIP ACT § 32(1)(e), (f), 6 U.L.A. 394 (1914). These "no fault" reasons are: "the business of the partnership can only be carried on at a loss," and "other circumstances render a dissolution equitable." *Id.*

whether it should aid a party seeking to breach an agreement by granting a divorce. Courts have asserted that they will not dissolve a business partnership at the request of a partner seeking dissolution in contravention of the agreement.<sup>117</sup> Such cases are distinguishable because the business partner does not need the court in order to terminate the relationship; she has the power of unilateral termination. Thus, there is no need for the court to act. Further, in negative covenant cases, the court actually aids the breaching party in denying the injunction. The difference between the "affirmative" act of granting an injunction and the "negative" act of estopping a party from seeking a divorce is merely a formal one. In both cases a court is acting in favor of one party against another.

American partnership law and the negative covenant cases indicate a strong preference for the freedom to terminate legal relationships involving significant personal commitment. These areas of the law suggest a court would invalidate the covenant not to sue for divorce. Although the court is placed in the position of aiding a party to breach her agreement, a role rejected by the courts in partnership cases, this rather formalistic point should not be sufficient to persuade courts to sustain the covenant not to sue for divorce. The case law suggests, then, that the contractual bar to divorce is unenforceable, not because the state insists on the inalienability of the right to divorce in particular, but because it has insisted more generally on the inalienability of the power to terminate personal relationships, including personal service and partnership relationships.

### 3. Other Perspectives on Specific Enforcement of the Covenant not to Sue for Divorce

Putting analogous cases to one side, one may ask anew whether specific performance of the agreement is necessary because the damages remedy is inadequate. The losses, or potential losses, that a person experiences at divorce are several: (1) the loss of accumulated wealth; (2) the loss of income; (3) the loss of spousal companionship; (4) the loss of the legal status of a married person; (5) the loss of the social status of a married person; and (6) the loss of children. The first two losses are financial and are amenable, albeit not fully amenable, to redress through an order to pay money or transfer property.<sup>118</sup> As to the third loss, if it is amenable to judicial redress of any sort, it is damages rather than specific enforcement, since a court cannot effectively order a person to be a spousal companion. The fourth loss can be prevented by an order barring divorce. To the extent that the fifth loss is derived from one's legal marital status (married or divorced) rather than one's social marital status (couple living together more or less harmoniously), it too can be affected by such an order. It is, however, increasingly doubtful that anyone's social status is significantly based

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117. *Yoder v. Hooper*, 695 P.2d 1182, 1187-88 (Colo. Ct. App. 1984), *aff'd en banc*, 737 P.2d 852 (Colo. 1987); *Collins v. Lewis*, 283 S.W.2d 258, 261 (Tex. Civ. App. 1955).

118. One may assume that no court will order an adult to cohabit with another, even if that other is her spouse, for the sake of complementarity or economies of scale.

on her legal marital status independent of her social marital status.<sup>119</sup> Finally, the sixth loss is amenable to an order of specific enforcement, but that order is a custody order and not an order barring divorce.<sup>120</sup>

Therefore, our focus is on the preservation of the legal status of married persons by specific performance. We will assume the loss of this status cannot be adequately compensated by an award of damages. What nonmonetary interests does such specific enforcement protect? Vindictiveness, of course, is an unacceptable foundation, but a substantial reason for making marriage difficult to dissolve is to provide an incentive to investment in marriage at a time when the spouses are psychologically open to such investment. In order to give that investment legal efficacy the court must specifically enforce the agreement at a time when one of the spouses is not psychologically open to investment. This analysis views marriage as deteriorating in substantial part because of underinvestment and maintains that investment in marriage can be increased by reducing alternative investments.<sup>121</sup>

Moreover, as a matter of legal and cultural history, there has been a difference between marriage and the personal relationships treated above. Even when the power to dissolve other contractual relationships was treated as inalienable, the dissolution of marriage was highly restricted. The marriage regime has moved closer to these other situations, but the difference between them may be recognized by permitting spouses to contract into a more restrictive regime, while prohibiting such contractual restrictions in other situations. In marriage, the unit, or family, is of much greater importance than in the business partnership or the producer-performer relationship, which does not even suggest the formation of a unit. Thus, self-imposed restrictions on the dissolution of the family unit are more justifiable.

A liberal, pluralistic legal culture does not require that every member herself be liberal; it should protect persons with traditional and restrictive views and projects. Agreements to give a religious divorce have been enforced,<sup>122</sup> suggesting a willingness to make the legal system available for the enforcement of promises that have only a cultural significance.<sup>123</sup> Moreover, as stated above, it is rational to establish a restrictive rule with respect to divorce in order to encourage investment and simultaneously diminish opportunity costs.<sup>124</sup>

By enforcing contractual bars to purely unilateral no-fault divorce, the state would permit the parties a range of marital or quasi-marital regimes. Toward one end of the spectrum would be unmarried cohabitation contracts; at the

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119. See generally Thornton, *Changing Attitudes Toward Separation and Divorce: Causes and Consequences*, 90 AM. J. SOC. 856 (1985) (examining broadening approval of marital dissolution and major determinants of personal attitudes about divorce).

120. See *infra* text accompanying notes 175-214.

121. See *supra* text accompanying notes 21-42.

122. *Avitzur v. Avitzur*, 58 N.Y.2d 108, 114-15, 459 N.Y.S.2d 572, 574-75, 446 N.E.2d 136, 138-39, *cert. denied*, 464 U.S. 817 (1983).

123. Nothing more than a legal divorce was necessary for Mrs. Avitzur to remarry under the civil law. Moreover, ordering Mr. Avitzur to appear before the Beth Din was essentially the same as ordering Wagner to sing in Lumley's theater.

124. See *supra* text accompanying notes 36-38.

center would be statutory marriage, with its financial incidents largely modifiable by spousal agreement; and toward the other end of the spectrum would be the regime governed by the Model Agreement, with limited revival of the traditional marital regime but acceptance, in addition to traditional fault divorce, of no-fault divorce to which the spouses mutually agree. Given the modern legal recognition that marriage is first and foremost a private matter, albeit with significant public consequences, and that deference to the spouses' judgment is the proper attitude of the state, it is reasonable for the state to accept their mutual determination at the outset of—or, for that matter, during—their marriage that there are some real risks that will not justify dissolving the marriage.

In conclusion, although the personal service contract cases and American partnership law suggest the right to divorce should be inalienable, that law is not unassailable in principle, and indeed English partnership law runs counter to American law on the matter of the power of dissolving partnerships for a term.<sup>125</sup> Moreover, the traditional recognition of the family as a strongly bound unit, together with the availability of other marital and quasi-marital regimes, suggests that covenants not to sue for divorce—so long as they are not absolute—should be enforced.

## B. *Contractual Burdens on Divorce*

### 1. Traditional Law of Divorce Contingencies in Antenuptial Agreements

Even assuming divorce cannot be contractually barred, it remains to be considered whether the right to divorce can be constrained indirectly by means of burdens. This is the issue raised by *Sanders v. Sanders*,<sup>126</sup> referred to at the beginning of this Article. The Sanders' antenuptial agreement provided for the pooling of their resources and the forfeiture of any rights to those assets by the spouse who sought a divorce.<sup>127</sup> Thus the disincentive fell on the party seeking divorce, regardless of whether that person was the husband or wife or the wealthier or poorer spouse.

When *Sanders* was decided in 1955, the law regarding financial provisions in antenuptial agreements was well settled throughout the United States. If such provisions were contingent upon death, they were valid; if contingent upon divorce, they were invalid, either presumptively or conclusively.<sup>128</sup> The reason for invalidating divorce contingencies was that they provided an incentive to divorce.<sup>129</sup> Although the antenuptial agreement in *Sanders* could have been justified as attempting to provide each spouse with financial incentives to remain married, the agreement did attempt to displace the divorce court in allocating

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125. See *supra* note 115.

126. 40 Tenn. App. 20, 288 S.W.2d 473 (1955).

127. *Id.* at 23-24, 288 S.W.2d at 474-75.

128. *Cohn v. Cohn*, 209 Md. 470, 121 A.2d 704 (1956); *Gant v. Gant*, 329 S.E.2d 106, 112 (W. Va. 1985) (stating traditional law); RESTATEMENT OF CONTRACTS § 584(1) (1932); Annotation, *Validity of Antenuptial Agreement, or "Companionate Marriage" Contract, Which Facilitates or Contemplates Divorce or Separation*, 70 A.L.R. 826, 827 (1931).

129. *Fincham v. Fincham*, 160 Kan. 683, 688-89, 165 P.2d 209, 212-13, *modified to permit division of property*, 161 Kan. 753, 173 P.2d 244 (1946); Annotation, *supra* note 128, at 826-28.

wealth at the time of divorce. There was no precedent for upholding such an agreement, and a great deal of precedent for invalidating it.<sup>130</sup> It is not surprising that the trial court held the Sanders' agreement contravened public policy.

Interestingly, the Tennessee Court of Appeals reversed the lower court, though it did not entirely disagree with it. The court declared the forfeiture provision to be reasonable given the marital history of this couple; however, the court limited the application of the provision to a divorce suit not prosecuted in good faith and upon reasonable grounds. The opinion suggests that if the divorce petitioner was successful, he or she would thereby satisfy the good faith and reasonableness requirement.<sup>131</sup> Consequently, under the court's interpretation of the agreement, the forfeiture provision is really based on wrongful civil proceedings rather than on simply filing for divorce.<sup>132</sup> By so interpreting the contract, the court avoided the issue relied upon by the trial court, namely, that agreeing to limit one's right to obtain a divorce is violative of public policy and unenforceable.

That issue, however, is the theoretically interesting question raised by *Sanders* and the one with which this Article is concerned. That general question has three aspects. First and fundamentally, do all divorce contingencies in antenuptial agreements that seek to displace, or substantially limit, the divorce court violate public policy?<sup>133</sup> Second, if such contractual burdens are not invalid per se, then is the particular distribution of wealth a violation of public policy?<sup>134</sup> Third, again if such contractual burdens are not invalid per se, is awarding custody of the children to the divorced spouse or the divorcing spouse who can show fault a violation of public policy?<sup>135</sup> This Article will discuss these questions in turn.

## 2. The Rejection of the Categorical Rejection of Divorce Contingencies

Since the landmark case of *Posner v. Posner*,<sup>136</sup> which rejected the traditional nonenforcement of divorce contingencies, the traditional rule has crumbled, if not disappeared.<sup>137</sup> Four justifications are given for upholding divorce contingencies. The first is logical. In *Posner*, the court pointed out that the traditional critique could be applied with equal force to death contingencies as

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130. See Annotation, *supra* note 128.

131. *Sanders*, 40 Tenn. App. at 35, 288 S.W.2d at 479.

132. Regarding wrongful civil proceedings, see W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 120 (5th ed. 1984).

133. See *infra* text accompanying notes 136-62.

134. See *infra* text accompanying notes 163-74.

135. See *infra* text accompanying notes 175-214.

136. 233 So. 2d 381 (Fla. 1970).

137. Annotation, *Modern Status of Views as to Validity of Premarital Agreements Contemplating Divorce or Separation*, 53 A.L.R.4TH 22, 29 (1987). For a rare and recent reaffirmation of the traditional rule, see *Sousley v. Sousley*, 614 S.W.2d 942, 944 (Ky. 1981) (refusing to overrule the "long standing precedent" of *Stratton v. Stratton*, 170 Ky. 61, 185 S.W. 522 (1916), and thus invalidating antenuptial agreement contemplating divorce). Courts are more likely to invalidate maintenance provisions in the antenuptial agreement than property provisions. See *In re Marriage of Winegard*, 278 N.W.2d 505, 512 (Iowa), *cert. denied*, 444 U.S. 951 (1979); *Duncan v. Duncan*, 652 S.W.2d 913, 915 (Tenn. Ct. App. 1983).

well as divorce contingencies. To use the court's example: A wife who did not like her prospects under the antenuptial agreement if her husband predeceased her would have an incentive to divorce in the hope that she would fare better in divorce court than under the agreement.<sup>138</sup> The Florida Supreme Court concluded that the critique itself was bad as applied to either contingency.<sup>139</sup>

A second, more important justification for upholding divorce contingencies is the altered social and legal status of divorce. Not only has the incidence of divorce increased in American society, but divorce is also more readily available because it does not require proof of marital guilt or fault.<sup>140</sup> The *Posner* court pointed to the then-new no-fault law in California.<sup>141</sup> Today, of course, it could point to the existence of no-fault divorce provisions in every state.<sup>142</sup> In some states, it is virtually the only basis for divorce.<sup>143</sup>

The *Posner* court drew two conclusions from these social changes. First, it was rational for persons to plan for divorce even when they intended that their marriage last a lifetime.<sup>144</sup> Second, the public policy objection to divorce was clearly much weaker.<sup>145</sup> If the state readily permitted persons to dissolve their marriages, it would be disingenuous for courts to assert an apparently antiquated public policy to countermand the rational divorce plans of the spouses. The court decided it would not invalidate divorce contingencies on a wholesale basis, but would operate at a retail level, invalidating only those provisions excessively inducing divorce.<sup>146</sup> This approach has been adopted by courts in a number of other jurisdictions.<sup>147</sup>

A third justification for upholding divorce contingencies is that they do not really provide an incentive to divorce in most cases.<sup>148</sup> A fourth justification is a curious transformation of the traditional policy favoring marriage. Because there are now fewer disincentives to cohabitation without marriage, many per-

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138. *Posner*, 233 So. 2d at 383.

139. *Id.* at 383-84.

140. *Id.* at 384.

141. *Id.*

142. In 1985 South Dakota became the last state to enact a no-fault divorce statute. 11 Fam. L. Rep. (BNA) 1274 (Apr. 9, 1985).

143. See, e.g., Act of June 24, 1983, 1983 N.C. Sess. Laws 548, ch. 613, § 1 (repealing fault grounds for absolute divorce).

144. *Posner*, 233 So. 2d at 384; see *Gant v. Gant*, 329 S.E.2d 106, 115 (W. Va. 1985).

145. *Posner*, 233 So. 2d at 384; *Newman v. Newman*, 653 P.2d 728, 731-32 (Colo. 1982) (en banc).

146. *Posner*, 233 So. 2d at 385. *In re Marriage of Noghrey*, 169 Cal. App. 3d 326, 215 Cal. Rptr. 153 (1985), is an example of a court's invalidating an antenuptial agreement at the retail level. In that case the spouses' antenuptial agreement provided that "in the event of a divorce" the husband would settle on the wife "the house . . . and \$500,000.00 or one-half of my assets, whichever is greater . . ." *Id.* at 329, 215 Cal. Rptr. at 155. After seven months of marriage, the wife obtained a divorce. The trial court upheld the agreement, but the court of appeal reversed, not because divorce contingencies were invalid per se, but because this agreement encouraged the wife "to seek a dissolution, and with all deliberate speed, lest the husband suffer an untimely demise, nullifying the contract, and the wife's right to the money and property." *Id.* at 331, 215 Cal. Rptr. at 156. The court added, "The prospect of receiving a house and a minimum of \$500,000 by obtaining the no-fault divorce available in California would menace the marriage of the best intentioned spouse." *Id.* at 331, 215 Cal. Rptr. at 157.

147. See Annotation, *supra* note 137.

148. *Newman v. Newman*, 653 P.2d 728, 732 (Colo. 1982).

sons will choose this form of intimate association unless they can order their financial affairs by antenuptial agreements in a way that does not put their assets at the statistically substantial risk of divorce. Because there is a societal preference for marriage, divorce contingencies should be upheld so that people can marry, confident that their wealth is not in jeopardy.<sup>149</sup>

Judicial rejection of the traditional rule has been seconded by legislative developments. Equitable distribution statutes permit spouses to contract out of the statutory regime and determine their property rights upon divorce by antenuptial or separation agreements.<sup>150</sup> In addition, a Uniform Premarital Agreements Act was approved by the National Conference of Commissioners on Uniform State Laws in 1983<sup>151</sup> and by the end of 1987 had been adopted by eleven states.<sup>152</sup> The Act provides that the parties to a premarital agreement may contract with respect to, *inter alia*, the disposition of property upon separation or marital dissolution<sup>153</sup> and the modification or elimination of spousal support.<sup>154</sup>

### 3. Application to the Model Agreement

These judicial and legislative changes, and the justifications on which they rest, provide substantial support for upholding the divorce contingencies of the Model Agreement as well. The Model Agreement makes marriage more attractive to persons concerned with protecting their investments in marriage to an extent that modern divorce law does not, and thus provides them with an incentive to make those investments which they otherwise would not make. There are two substantial differences between the Model Agreement and the classic antenuptial agreement that may raise doubts about the former's validity even under a regime that generally accepts divorce contingencies. First, the Model Agreement may involve a substantial transfer of assets to the divorced spouse. Under the classic agreement, there is either no transfer or the transferor is probably better off with the agreement than she would be without it. Second, the Model Agreement is not simply divorce-conscious, but expressly burdens the decision to divorce. The classic antenuptial agreement only incidentally provides divorce incentives or disincentives. To the extent such incentives or disincentives exist, they are a function of the individual's wealth. A spouse without an independent source of income will be less likely to seek a divorce than a spouse with one, but the classic agreement does not allocate wealth on the basis of which spouse obtains the divorce. This Article will address these concerns in turn.

Although the courts are rightly concerned about an agreement that permits a spouse to gain substantially upon divorce, the chief concern is that a spouse

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149. *Id.* at 731; *Gant v. Gant*, 329 S.E.2d 106, 112-13 (W. Va. 1985).

150. *See, e.g.*, N.Y. DOM. REL. LAW § 236(B)(3) (McKinney 1987); N.C. GEN. STAT. § 50-20(d) (1987).

151. 9B U.L.A. 369 (1987).

152. *Id.* at 6 (1988 Supp.) (Arkansas, California, Hawaii, Maine, Montana North Carolina, North Dakota, Oregon, Rhode Island, Texas, Virginia).

153. UNIF. PREMARITAL AGREEMENT ACT § 3(a)(3), 9B U.L.A. 373 (1987).

154. *Id.* § 3(a)(4), 9B U.L.A. at 373.



can gain by exercising her right to divorce. In *In re Noghrey*, for example, had the couple's antenuptial agreement been upheld, the wife would have gained a house and at least half-a-million dollars upon divorcing her husband of seven months.<sup>155</sup> But this situation could not arise under the Model Agreement because a spouse is not benefited by obtaining a divorce; quite the opposite. The possibility remains, however, that one spouse may attempt to goad the other into obtaining a divorce in order for the goader to obtain the preferred distribution of family wealth upon divorce.<sup>156</sup> The Agreement provides some check on goading in that it permits a spouse who can show cruelty on the part of the other spouse not only to divorce but to obtain the preferred distribution of family wealth. Thus the Agreement deters goading that amounts to cruelty. Cruelty as defined by the agreement is "cruel and wanton conduct calculated to inflict suffering on the other spouse."<sup>157</sup> It is not required that the other spouse suffer physical injury or be subjected to a threat to her health. A key point is the intention of the spouse allegedly inflicting the cruelty. If the conduct is "calculated to inflict suffering," it may amount to cruelty if it is also cruel and wanton. If it can be shown that a spouse has been goading her spouse to drive him to seek a divorce, that behavior clearly meets the requirement of "calculated to inflict suffering." Hence, the Agreement does not provide an incentive for a spouse to seek a divorce, either by obtaining one directly or by goading the other to seek one.

The other general objection is that the right to divorce should not be burdened by disincentives to the divorcing spouse. The cases on negative covenants and partnerships for a term examined earlier<sup>158</sup> clearly support the proposition that the decision to terminate a relationship in breach of contract subjects the breaching party to damages.<sup>159</sup> The interest in personal autonomy does not extend so far as to insulate a person from any disincentive. In addition, the *Posner* line of cases also accepts that at least one spouse will have a financial disincentive toward divorce—the spouse who would in the absence of an agreement share in a greater portion of the family wealth.<sup>160</sup> The Model Agreement simply puts both spouses under the same disincentive.

Moreover, as stated earlier,<sup>161</sup> the state's adoption of no-fault divorce should not be interpreted as furthering a policy of government insistence on a

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155. *In re Marriage of Noghrey*, 169 Cal. App. 3d 326, 331, 215 Cal. Rptr. 153, 156 (1985); see *supra* note 146.

156. See, e.g., *Fincham v. Fincham*, 160 Kan. 683, 688, 165 P.2d 209, 213 (1946) (husband might become "grossly abusive, completely intolerable and deliberately bring about separation"); *Stefonick v. Stefonick*, 118 Mont. 486, 499-500, 167 P.2d 848, 854 (1946) (husband might have "everything to gain and nothing to lose" by bringing about such a condition of the marital relationship as would render divorce or separation proceedings by the wife imperative").

157. Model Agreement, para. 11(3).

158. See *supra* text accompanying notes 105-17.

159. In *Lumley v. Wagner*, 42 Eng. Rep. 687 (Ch. 1852), Ms. Wagner's counsel, in opposing the issuance of an injunction, "contend[ed] that the agreement is a purely personal contract, for the infraction of which damages are a complete and ample remedy . . ." *Id.* at 689. Regarding partnerships, see *supra* note 114.

160. See, e.g., *Osborne v. Osborne*, 384 Mass. 591, 428 N.E.2d 810 (1981) (husband stands to gain by not divorcing); *Gant v. Gant*, 329 S.E.2d 106, 116 (W. Va. 1985) (wife stands to gain by not divorcing).

161. See *supra* text accompanying note 104.

divorce even if only one spouse wants it, but rather as a withdrawal by the state from its traditional paternalistic posture toward married couples. In its new posture, the state permits married couples to subject themselves to their own rules, much as it does in other areas, such as the transfer of property upon the owner's death. The rules of inheritance do not prohibit disinheritance, and to the extent that they prohibit the *complete* disinheritance of a spouse,<sup>162</sup> the Model Agreement is in accord in that it prohibits the complete denial (directly or indirectly) of divorce by allowing for divorce if there is a showing of abandonment, adultery, or cruelty. Even more on the point, the states' recognition of quasi-marital obligations arising from quasi-marital relations indicate their willingness to allow the persons involved to set the terms of their intimate relationships.<sup>163</sup>

### C. *Distributions Contingent on Divorce: Liquidated Damages or Penalties?*

Assuming that financial burdens intentionally placed on the exercise of the right of unilateral no-fault divorce are not invalid per se, it remains to be determined whether there are limits to those burdens. Surely, the Sanders' winner-take-all distribution scheme is suspect, and in *Noghrey*, the court was disturbed by the sheer size of the stakes—a house and half-a-million dollars.<sup>164</sup> Conversely, one justification for upholding divorce contingencies is that they have a negligible effect on the divorce decision.<sup>165</sup> It is assumed, however, that the terms of the Model Agreement are substantial burdens on the divorce decision. The question addressed in this section is whether the burden is excessive and thus unjustifiable.

Consider contracts other than the Model Agreement that provide for specific payments should a breach occur. With respect to such payments, contract law distinguishes between *penalties*, which are not permissible, and *liquidated damages*, which are—as long as the amount is reasonable.<sup>166</sup> Liquidated damages are essentially based on need—the need arising from the loss occasioned by the promisor's failure to perform—whereas penalties are not. To be sure, the purpose of a penalty is to deter the need's arising in the first place, but the size of the payment more than compensates the need.

Marriage and divorce-related contracts also call for payments either to stop or start upon the occurrence of certain contingencies, in particular marriage and remarriage.<sup>167</sup> When the contingency occurs, payment or forfeiture of payment has been challenged as against public policy because it tends to inhibit the exer-

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162. See P. HASKELL, PREFACE TO WILLS, TRUSTS AND ADMINISTRATION 134-43 (1987).

163. See, e.g., *Marvin v. Marvin*, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976) (even a tacit understanding may be enforceable); *Watts v. Watts*, 137 Wis. 2d 506, 405 N.W.2d 303 (1987) (claim stated for breach of express or implied contract).

164. See *supra* note 146.

165. See *supra* text accompanying note 148.

166. 5 A. CORBIN, *supra* note 101, §§ 1057 & 1059.

167. See, e.g., *In re Dodge*, 150 Ill. App. 3d 486, 501 N.E.2d 1354 (1986) (forfeitures upon remarriage valid generally); *Cowan v. Cowan*, 247 Iowa 729, 75 N.W.2d 920 (1956) (some forfeitures restraining second marriage are void).

cise of the right to marry.<sup>168</sup> Some of these provisions are based on expected need or loss and are thus analagous to liquidated damages; others are not and are more like penalties. By applying general contract law, the need-based provisions should be upheld, but the provisions not based on need should be invalidated.<sup>169</sup>

A recent example of a need-related restraint is *In re Dodge*,<sup>170</sup> in which the Illinois Appellate Court upheld a separation agreement providing that a former husband would be released from paying taxes on the family home if his former wife remarried. It is a basic tenet of divorce law that alimony is based on need and terminates upon the payee's remarriage because of the conclusively presumed reduction of need.<sup>171</sup> The tax payment in *Dodge* closely resembled alimony payments, and its termination can be justified on reduced need.<sup>172</sup>

Losses similar to those arising upon divorce are commonly calculated in wrongful death cases and consist of loss of consortium, loss of income, and loss of services.<sup>173</sup> The lost consortium component should be excluded from the divorce context. Where damages are awarded, the consortium is lost through invasion of a third party. Outside invasions are not at issue in our context, however, and the law should not be used to sanction a person for not being companionable. Loss of income, however, and loss of services provided to the family by the former spouse are more readily transferable from the wrongful death context to the divorce context. These losses are not so intimately tied to the quality of the interpersonal relationship as is loss of consortium. Although it is socially unacceptable to hire someone for sexual services or companionship, it is perfectly permissible to hire babysitters, tutors, cooks, housecleaners, laundress, painters, mechanics, plumbers, gardeners, etc. To the extent that the divorcing spouse provided any of these or other similar services, the divorced spouse is deprived of them. Of course, the divorced spouse may, after divorce, perform them herself, but such performance costs time she would have spent either earning income, performing other household services, resting, or engaging in activities for personal pleasure.

Another major loss is loss of the divorcing spouse's income, whether earned or unearned, including loss of future increases in income. Still other losses arise

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168. See *supra* note 166.

169. Although the courts appear to be more chary of penalty provisions, cases can be found upholding both sorts of payments. In *Cowan v. Cowan*, 247 Iowa 729, 75 N.W.2d 920 (1956), for example, the parties entered into a "collateral agreement" just prior to divorce that provided that if either party should remarry before their youngest child reached the age of majority, he or she would pay \$10,000 to the other. When the former husband remarried within the proscribed period, the former wife sued on the contract and won. The court justified its decision on the grounds that the restraint was not general and that it was reasonable. It was not general because the restraint was limited to the period prior to the youngest son's reaching the age of majority—seven or eight years. *Id.* at 735, 75 N.W.2d at 923-24. It was reasonable, in the court's view, because the apparent purpose of the agreement was to prevent the marriage of the father and the woman with whom he had committed adultery as long as the sons were minors and living at home with the father. The court declared this purpose to be "laudable." *Id.* at 735, 75 N.W.2d at 924.

170. 150 Ill. App. 3d 486, 501 N.E.2d 1354 (1986).

171. H. CLARK, *supra* note 6, § 14.9, at 457.

172. *In re Dodge*, 150 Ill. App. 3d at 494, 501 N.E.2d at 1358-59.

173. D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 8.4 (1973).

from lost complementarity and lost economies of scale. The spouses may have had children and a high standard of living because one of the spouses specialized in income producing labor and the other in unpaid domestic labor. Upon divorce, this complementarity or synergy is lost. As to lost economies of scale, painting and heating costs, for example, are the same whether one or both spouses live in the house. House payments or rent remain the same for the particular dwelling, and because spouses share virtually every room in their dwelling, no savings are obtained by a person when his spouse leaves. The remaining person still needs all these rooms or areas and they must be of virtually the same size.

The result is familiar enough: the divorced spouse has substantial losses of money and time imposed on him. The financial provisions of the Model Agreement are intended to liquidate those losses, which are prospective at the time the Agreement is entered into and virtually impossible to fix precisely. It is especially difficult to liquidate the losses in dollars, because the Agreement may come into effect many years later when the value of the dollar as well as the financial condition of the couple may substantially differ from their status at the time of the execution of the Agreement.

Because the provisions of the Agreement are aimed at compensating the divorced spouse for the losses described above, rather than penalizing the divorcing spouse, the Model Agreement does not employ the winner-takes-all form of the Sanders' antenuptial agreement. The unequal division of the property and future income compensate for lost complementarity and lost economies of scale. The divorced spouse's continued sharing in the divorcing spouse's increases of income compensates for reasonable expectation at the time of marriage that each will share in the other spouse's fortune, good or bad. These latter provisions are contrary to the policy favoring a clean break at the time of divorce, but the spouses have clearly chosen to subject themselves to a different regime. There is nothing so plainly harmful in that regime to justify a paternalistic imposition of the state's regime in preference to the one the spouses have chosen for themselves.

Where the income and wealth of the spouses are roughly equal or where the divorced spouse has less income and wealth, the unequal distribution of wealth and income provided for in the Model Agreement can be fairly characterized as liquidated damages. The case in which the divorcing spouse has substantially less wealth and income than the divorced spouse is more problematic. Of course, in this situation the income provision will be of no consequence since the divorced spouse will by hypothesis make at least sixty percent of the couple's combined post-divorce income by herself; therefore, the divorcing spouse will not be obligated to transfer any portion of his significantly smaller income. But the spousal property will be divided in favor of the divorced spouse and the divorced spouse will be entitled to fifty percent of the value of the human capital built up by the divorcing spouse during the marriage.

It is commonplace under the classic, preservation-of-separate-property antenuptial agreement for one spouse to receive by far the greater portion of the

couple's net assets upon divorce, and these agreements are enforced.<sup>174</sup> Thus the disparity is not in itself enough to invalidate this agreement. Even when the divorced spouse is considerably wealthier than the divorcing spouse, the latter may impose a loss on the former in the form of either loss of income or loss of services (apart from loss of consortium). If the divorcing spouse is one who stays at home and cares for the house and the children, the loss of her services imposes a considerable loss on the other spouse.<sup>175</sup> The seventy-five percent to twenty-five percent division of this property is a fair premarital estimate of the extent of the loss occasioned by the divorcing spouse's withdrawal of services, and therefore should be enforced as liquidated damages.

#### D. *Antenuptial Agreements Regarding Child Custody upon Divorce*

One of the substantial costs of divorce is the mutual separation of the children and the noncustodial spouse.<sup>176</sup> This basic cost of separation can be increased by the remarriage of the custodial parent<sup>177</sup> or by a substantial geographical move that makes even bi-weekly visits practically impossible.<sup>178</sup> The trend toward joint custody does not in many instances alleviate these costs.<sup>179</sup> In some instances, joint custody means merely joint legal custody; the residential arrangement is the same as under the typical sole custody arrangement—every other weekend with the parent with whom the children do not reside.<sup>180</sup> Even in cases of joint physical custody, the arrangement is often fragile. It is disturbed by a remarriage, a move, or simply the child's (or the parents') tiring of all the shuttling.<sup>181</sup>

174. See, e.g., *Osborne v. Osborne*, 384 Mass. 591, 428 N.E.2d 810 (1981); *Gant v. Gant*, 329 S.E.2d 106 (W. Va. 1985).

175. Minton, *Evaluating the Homemaker's Services*, in *DIVORCE MATH* (1982); Lambert, *How Much is a Good Wife Worth*, 41 B.U.L. REV. 328 (1961).

176. J. WALLERSTEIN & J. KELLY, *SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE* 10 (1980) ("overwhelming majority [of children] preferred the unhappy marriage to the divorce"); Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477 (1984).

177. When custodial mothers remarry, the percentage of noncustodial fathers having weekly contact with their children was half of what it was when the custodial mothers remained unmarried (14% to 29%). Fox, *Noncustodial Fathers*, in *DIMENSIONS OF FATHERHOOD* 403 (S. Hanson & F. Bozett eds. 1985).

178. See, e.g., *Cooper v. Cooper*, 99 N.J. 42, 491 A.2d 606 (1984) (transcontinental move); *Aldrich v. Aldrich*, 130 A.D.2d 917, 516 N.Y.S.2d 328 (1987) (permitting transcontinental move; relocation to new spouse's place of employment constitutes exceptional circumstances justifying disruption of noncustodial parent-child relationship); see Fox, *supra* note 176, at 404 ("Proximity is also a factor in the probability of weekly contact between children and their noncustodial fathers. When the father lived within an hour of the children, 31% had weekly contact; when he lived more than an hour away, only 16% had weekly contact.").

179. *Winebright v. Winebright*, 155 Ill. App. 3d 722, 508 N.E.2d 774 (1987) (permitting move out of state despite joint custody and extensive involvement by both parents in children's lives as long as quality of life of custodial parent and children is improved); *Gordon v. Gordon*, 339 N.W.2d 269 (Minn. 1983) (permitting parent with sole physical custody under joint custody decree to relocate absent showing that relocation not in best interests of child).

180. A. HARALAMBIE, *HANDLING CHILD CUSTODY CASES* § 5.07, at 57 (1983).

181. Among a group of divorced parents highly motivated toward joint physical custody, Steinman was "surprised to find" in follow-up interviews that within twelve to eighteen months:

one-third of the families had shifted to an arrangement in which their children lived primarily in one home . . . . The major events that precipitated the shift from a dual-home to a

Custody disputes between divorcing parents are decided under the rubric of "the best interests of the child," a well-intentioned but notoriously indeterminate standard for decisionmaking.<sup>182</sup> Because of its indeterminacy and the momentousness of the decision, the attraction of categorical rules and presumptions is great. For the greater part of this century the maternal preference reigned until its power was eliminated or diminished under the pressure of the Supreme Court's gender-discrimination cases.<sup>183</sup> With the maternal preference under a constitutional cloud, the primary caretaker rule has arisen.<sup>184</sup> This test categorically prefers the parent who "has taken primary responsibility for . . . the performance of the [various] caring and nurturing duties of a parent."<sup>185</sup> Indeed, even without the formality of a named presumption or preference, courts prefer the parent who is the primary caretaker.<sup>186</sup>

Two principal justifications exist for the use of the primary caretaker presumption. One is the elimination of strategic behavior in divorce negotiations.<sup>187</sup> The contention is that the parent who is not the primary caretaker and who does not really want custody of the children will, for negotiating leverage on the financial issues, claim that she wants custody and is willing to engage in a custody battle.<sup>188</sup> To be sure, fair bargaining is a worthwhile goal, but the cost of the presumption is high since it requires the categorical denial of genuine custody claims by nonprimary caretakers.

The other principal justification of the primary caretaker presumption is that granting custody to this person is in the best interests of the child.<sup>189</sup> Pro-

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primary-home arrangement were: a geographical move; remarriage and a new baby (we were surprised to find that remarriage alone did not seem to have an effect); and entry of the child into adolescence.

Steinman, *Joint Custody: What We Know, What We Have Yet to Learn, and the Judicial and Legislative Implications*, 16 U.C. DAVIS L. REV. 739, 748 (1983).

182. See Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. CHI. L. REV. 1 (1987); Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS., Summer 1975, at 226. Joseph Goldstein and his coauthors have suggested that "a judicially supervised drawing of lots between two equally acceptable psychological parents might be the most rational and least offensive process for resolving the hard choice." J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 175 n.12 (1979) [hereinafter *BEYOND BIC*]. This suggestion was reiterated in a later book. J. GOLDSTEIN, A. FREUD, A. SOLNIT & S. GOLDSTEIN, *IN THE BEST INTERESTS OF THE CHILD* 24 & 68 (1986) [hereinafter *IN BIC*].

183. See *Devine v. Devine*, 398 So. 2d 686 (Ala. 1981) (maternal preference unconstitutional even if only a rebuttable factual presumption). But the maternal preference has not been eliminated. See *Leisge v. Leisge*, 223 Va. 688, 292 S.E.2d 352 (1982) (award of custody to suicidal mother not found to be unfit rather than to excellent father was proper). For a general discussion of the continued use of the maternal preference, see Annotation, *Modern Status of Maternal Preference Rule or Presumption in Child Custody Cases*, 70 A.L.R.3d 262 (1976).

184. See *Derby and Derby*, 31 Or. App. 803, 571 P.2d 562, modified on other grounds, 31 Or. App. 1333, 572 P.2d 1080 (1977); *Garska v. McCoy*, 278 S.E.2d 357 (W. Va. 1981). See generally Annotation, *Primary Caretaker Role of Respective Parents as Factor in Awarding Custody of Child*, 41 A.L.R.4th 1129 (1985) (factors to be considered as part of primary caretaker rule and comparison of its use in different jurisdictions).

185. *Garska*, 278 S.E.2d at 363.

186. See *id.* at 361.

187. *Id.* at 360-62.

188. *Id.* at 362 (discussing "Solomon syndrome," namely, the parent most attached to the child will be most willing to accept an inferior bargain).

189. *IN BIC*, *supra* note 181, at 66-67, *Garska*, 278 S.E.2d at 361.

ponents of this position maintain that if the best interests test is to be something other than judicial crystal ball gazing, the sights must be focused on stability and continuity.<sup>190</sup> Thus, assuming the primary caretaker is fit, custody should be awarded to her because she represents stability and continuity.

The categorical position that because a person has been the primary caretaker in an ongoing marriage that person should receive custody should be rejected. Assumption of the primary caretaker duties was a division of labor worked out by the couple for their intact family life. To the extent the primary caretaker presumption suggests that the primary caretaker is more concerned about the children and is thereby the worthier claimant, the presumption is insensitive to the pressures that impose specialization on spouses. One spouse may have been the primary caretaker simply because it is traditional for women to be primary caretakers. Another related reason is that because men are paid better, the couple rationally chose to maximize the return on the expenditure of their labor power by having the man specialize in income-producing labor and the woman in nonincome-producing labor.<sup>191</sup> Just as it is inequitable to say to the woman at the time of divorce, "It was your decision to prefer the domestic sphere to the marketplace; now you must live with the consequences," it is likewise inequitable to say to the man, "It was your decision to prefer the marketplace to the domestic sphere; now you must live with the consequences."<sup>192</sup> The allocation of their resources is a decision for which the spouses are jointly responsible, whether or not their decision was a highly reflective, liberated one or an unreflective, customary one tacitly affirming the traditional wisdom of their culture.<sup>193</sup>

Proponents of the best interests test, or the more specific primary caretaker presumption, justify the test on the basis of the exclusive goal of maximizing the children's welfare.<sup>194</sup> In common speech, the children should be hurt as little as possible by the divorce. These proponents acknowledge that the loss of contact with the children may be a great cost to the noncustodial parent, but ultimately that parent's interests are accorded no weight in the decision making process.<sup>195</sup>

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190. BEYOND BIC, *supra* note 181, at 49-52; Garska, 278 S.E.2d at 361.

191. See G. BECKER, *supra* note 24, ch. 2 ("Division of Labor in Households and Families"); P. BLUMSTEIN & P. SCHWARTZ, AMERICAN COUPLES 159-60 (1983) (women happier and relationships more stable when male partners ambitious and successful); Moen & Dempster-McClain, *supra* note 33. I am not maintaining that specialization is preferable to an equal sharing of the various roles involved in domestic and market production. My point is that specialization is a rational choice made for the good of the community (the family). Once that community is disbanded, the choices made on the basis of the marriage should not bind the individuals.

192. Moen & Dempster-McClain, *supra* note 33, at 588 ("[O]ver half of mothers and almost two-thirds of fathers say that they would prefer to work fewer hours per week in order 'to spend more time with their spouse and children.'").

193. Moen & Dempster-McClain, *supra* note 33, at 585 ("Considering the existing occupational structure and conventional gender roles (i.e., for men, higher potential and real earnings, greater emphasis on vertical career development, and greater stigma attached to withdrawal from labor force), fathers preferring less work involvement have few options.").

194. BEYOND BIC, *supra* note 181, at 53.

195. BEYOND BIC, *supra* note 181, at 37-38, 108-11.

For example, in *Derby and Derby*,<sup>196</sup> custody was awarded to the mother because she was the primary caretaker, even though the father both "played the traditional role of breadwinner" and "dedicated much time and attention to the children . . . ."<sup>197</sup> Indeed, Goldstein and his coauthors, in focusing exclusively on the best interests of the child, wind up rejecting even visitation rights for the noncustodial parent.<sup>198</sup>

Courts have not adopted the Goldstein view on visitation, thus recognizing that parents do have a right to be with their children and that that right must be taken into account even though subordinated to the best interests of the child. I would extend the notion of parental right to the custody decision as well. The goal should be the maximization of the sum of the welfare of the children and the welfare of the divorced parent, unless it can be shown that the children's welfare undergoes a very substantial deterioration under the latter approach. Although the spouse who breaks up the family by divorce also suffers a loss in not having daily contact with the children, that is a loss she has consented to bear.

Certainly the rational divorcing spouse takes into account the potential loss of the children to herself in deciding whether to proceed with divorce.<sup>199</sup> But the cost of the loss of the children to the divorced spouse may not be taken into account or may actually be perceived by the divorcing spouse as a benefit, due to spite, or reverse altruism. By the terms of the Model Agreement, the spouses require that the divorcing spouse take account of the loss of the children by placing that risk on the divorcing spouse except when divorce is justified because of a serious marital fault.

The cost of losing the children can be brought home to the spouses through the use of a contractual provision that provides: "The divorced spouse will receive sole legal and physical custody of the children unless it can be shown by clear and convincing evidence that such placement is seriously detrimental to the children."<sup>200</sup> Such a provision may reflect a more accurate conception of the family than that implied by the present regime of unilateral no-fault divorce, with its emphasis on individual spousal freedom. A traditional view of marriage is that it is child-centered.<sup>201</sup> Although that view has been criticized as neglect-

196. 31 Or. App. 803, 571 P.2d 562, *modified on other grounds*, 31 Or. App. 1333, 572 P.2d 1080 (1977).

197. *Id.* at 806-07, 571 P.2d at 564.

198. BEYOND BIC, *supra* note 181, at 38. This is not to say that there is no benefit to the child from visitation with the noncustodial parent. Goldstein, *In Whose Best Interest?*, in JOINT CUSTODY AND SHARED PARENTING 48 (J. Folberg ed. 1984).

199. Of course, it is possible that the loss of the children involves no cost to the divorcing spouse or is even perceived as a benefit, but the point remains that the probable cost or benefit enters into the divorcing spouse's utility calculation.

200. See Model Agreement para. 6(1).

201. See R. BRIFFAULT & B. MALINOWSKI, MARRIAGE: PAST AND PRESENT 50 (1956) (essence of marriage not intimacy but "parenthood and above all maternity"). This is, for example, the official view of the Catholic Church, as illustrated by several major pronouncements on marriage made in the twentieth century.

And finally this [conjugal] love is *fecund* for it is not exhausted by the communion between husband and wife, but is destined to continue, raising up new lives. "Marriage and conjugal love are by their nature ordained toward the begetting and educating of children. Chil-



ing the significance of spousal love, it is arguable that the former imbalance has been too vigorously redressed. While the spouses may agree that each would be happier living apart from the other, *if that were all there were to consider*, one of the spouses may prefer that the family remain together not precisely for the sake of the children but for the sake of maintaining her everyday relationship with the children. That desire is entitled to substantial respect. As a matter of general law, it may be preferable not to restrict divorce because of the possibility that the spouses will have children, or to establish a separate marital regime for spouses with minor children.<sup>202</sup> However, the preference for spousal freedom to divorce does not so obviously outweigh the interest in keeping the family intact that the state should preclude persons from reaching an agreement, even prior to marriage, regarding custody of children upon divorce.

Thus, the provision of the Model Agreement precludes even a spouse who would otherwise be fairly confident of obtaining custody of the children—a full-time mother—from obtaining custody in a pure unilateral no-fault divorce. This person could seek to have the court declare the custody provision unenforceable and of no weight, either in a predivorce action for a declaratory judgment or simply in the divorce action itself. Her argument would be that the agreement unduly burdens her statutory right to a unilateral no-fault divorce. The court, she would maintain, may not be precluded from considering the best interests of the child by an agreement between the spouses.

The theory behind the Model Agreement, however, does not disregard the best interests of the child in favor of a parental right theory. It simply rejects a hyper-refinement like the primary caregiver approach when the cost is nonconsensual deprivation of a psychological parent's daily contact with her children. Professor Goldstein, when confronted with the situation of a parent who was not actually caring for his child on an hour-to-hour basis, asserted the continuity essential to the psychological parent-child relationship was defined by the child's expectation that the psychological parent would be there for the child day after day, night after night, but not necessarily hour after hour.<sup>203</sup> In my view, it is

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children are really the supreme gift of marriage and contribute very substantially to the welfare of their parents."

Pope Paul VI, Encyclical *Humanae Vitae* (July 25, 1968), in OFFICIAL CATHOLIC TEACHINGS: LOVE AND SEXUALITY 335 (O. Liebard ed. 1978) [hereinafter OCT] (quoting Second Vatican Council, Pastoral Constitution *Gaudium et Spes* (December 7, 1965) in OCT at 281). *Gaudium et Spes* itself recognizes that "[m]arriage to be sure is not instituted solely for procreation," *id.* at 282; however, it also states:

[W]hile not making the other purposes of matrimony of less account, the true practice of conjugal love, and the whole meaning of the family life which results from it, have this aim: that the couple be ready with stout hearts to cooperate with the love of the Creator and the Savior, who through them will enlarge and enrich His own family day by day.

Parents should regard as their proper mission the task of transmitting human life and educating those to whom it has been transmitted.

*Id.* at 281; see also Pope Pius XI, Encyclical *Casti Connubii* (December 31, 1930) in OCT 27-29 (emphasizing primacy of the begetting and raising of children in marital relation).

202. Younger, *Marital Regimes: A Story of Compromise and Demoralization, Together with Criticism and Suggestions for Reform*, 67 CORNELL L. REV. 45, 90 (1981) (proposing a "marriage for minor children," which would be more difficult to terminate than a marriage of persons without minor children).

203. "A psychological parent is one who, on a continuing, day-to-day basis, through interaction,

enough that someone is a psychological parent. He should not lose the custody dispute because he is not the primary psychological parent.

A test that focuses exclusively on the best interests of the child is not so clearly superior to a rule that maximizes a wider set of interests so that the parties should be precluded from contracting into the latter rule. In addition, the best interests of the children are probably served by having two active parents,<sup>204</sup> and to the extent that the rule deters pure unilateral no-fault divorce, it fosters the best interests of the child. Second, the rule under the agreement is constrained by a "satisficing,"<sup>205</sup> if not maximizing, rule with respect to the children's welfare; that is to say, the child's interest may be satisfied by placing him with either parent provided that both are psychological parents, even though only one is the primary caretaker.<sup>206</sup> So long as the child's interests are satisfied, one should prefer a rule that maximizes a wider group of interests.

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companionship, interplay, and mutuality, fulfills the child's psychological needs." BEYOND BIC, *supra* note 181, at 98. In testimony in a child custody case, Professor Goldstein emphasized that a psychological parent is not necessarily the person who is giving the child minute-to-minute care:

Q: You have taken into consideration, I assume, in answering as you have, that Mr. Rose [the father] will be by necessity away from the child during periods of time when he's going to have to be on training at the school, and that during those periods of time, that he will be under the care of a competent woman, or possibly even a babysitter at times, or some child-care center. You realize that, do you not? A: Yes. I realize that no parent can spend every minute with a child, and in fact, I think it probably would be detrimental to the well-being of the child if every minute was spent with the child.

One of the things that we're talking about when we talk about psychological parent is what is beginning to be internalized by the child about the outside world and its reliability. That's how kids are able to go to school and go to nursery school and spend time away from their parents; they begin to internalize the parent. The parent becomes a part of them, because there's an experience that the child grows on of the parent always coming back. And so the experience as you've described it that Jason [the child] has had, is that his father is always coming back, even though he's out of the house from time to time. And that he's there night after night after night, or day after day, even though it's not every hour or every minute. So it's that inner strength that's being built, which permits a child over time to develop the independence that we all want for each of our kids, to be able to walk alone in the world, but that they're carrying within them, if the relationship has been substantial, a rather substantial hunk of what their parents had to offer.

J. AREEN, CASES AND MATERIALS ON FAMILY LAW 409 (2d ed. 1985).

204. See Kelly, *Examining Resistance to Joint Custody*, in JOINT CUSTODY AND SHARED PARENTING 40-41 (J. Folberg ed. 1984).

205. Cf. D. GAUTHIER, *supra* note 26, at 184. Gauthier defines *satisficing* as "set[ting] a threshold level of fulfillment and choos[ing] the first course of action of those coming to mind that one expects to meet this level." *Id.* I am using the term in a somewhat different context, as a constraint on maximization. In this context, satisficing means that one particular component of the sum to be maximized must be at or above some threshold in order for the maximization to be acceptable. Thus, for example, if in one case the sum of the components A and B is 100, and in the other 80, the first case would be preferable. However, if a satisficing threshold of 40 is set for the A component, and if in the first case the sum is made up of 30 (A) and 70 (B), that result falls below the threshold and is unacceptable. If in the second case, the sum (80) is made up of 40 (A) and 40 (B), it is acceptable. In our context, the interests of the child must be "satisfied" if not maximized in order for the disposition to be acceptable.

206. It is not reported that "incompetence in the primary caretaker role" presents "an initial difficulty" for many noncustodial fathers. Fox, *supra* note 176, at 407. However, custodial fathers "apparently experience little difficulty in taking on" homemaking activities although they are "generally not active in [such] activities before they become single parents." Hanson, *Single Custodial Fathers*, in DIMENSIONS OF FATHERHOOD 374 (S. Hanson & F. Bozett eds. 1985) (citing Chang & Deinard, *Single Father Caretakers: Demographic Characteristics and Adjustment Processes*, 52 AM. J. ORTHOPSYCHIATRY 236 (1982)).

Thus, where there is an agreement between the parents regarding custody of their children upon divorce, it should govern.<sup>207</sup>

There is a rejoinder to this argument. The primary caretaker role also reflects the parties' agreement, but it is more than a paper agreement—it is the arrangement that the parties actually put into practice. The antenuptial agreement, on the other hand, merely reflects an arrangement the parties made before they had any children. The agreement's principal purpose was its *in terrorem* effect on the primary caretaker.

The primary caretaker arrangement, however, was put in place under the conditions of the contract. The husband, let us say, can argue that the actual division of labor developed by the couple was acceptable to him because the agreement assured him it would not be held against him, that he would not lose his children because he had agreed to his wife's being the primary caretaker.

This contractual approach is to some extent reminiscent of the fault approach of nineteenth century American custody law.<sup>208</sup> Custody law has long attempted to balance the good of the child with the rights and interests of the parents. Thus, Bishop was able to say, "[T]he leading doctrine in awarding the custody is to consult the good of the children, rather than the gratification of the parents."<sup>209</sup> But blended with the good of the child was the superior right of the innocent party.<sup>210</sup> The rights of the innocent spouse had two foundations, generally thought to reinforce one another. First, a person who abused one domestic relation was thought likely to abuse the other.<sup>211</sup> Second, it was thought that a person who was compelled to dissolve the marital relationship because of the other spouse's wrong should not pay for that rightful act by losing custody of the children.<sup>212</sup> This fault approach is not entirely passé.<sup>213</sup>

The difference between the contractual approach and the fault approach is that the latter purported to determine which parent was the better parent; its chief function was in combatting the maternal preference rule.<sup>214</sup> Thus, although a mother would normally receive custody of her children, especially if they were young, this might not be the case if she were shown to be adulterous.<sup>215</sup> The contractual approach does not assume that the divorcing spouse or

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207. *Garska* puts a great deal of emphasis on this point. *Garska*, 278 S.E.2d at 360-62. Goldstein and his coauthors express a preference for parental determination of custody: "This determination [i.e., of who will be the custodial parent after separation] may be made either by agreement between the divorcing parents or by the court in the event each claims custody." *BEYOND BIC*, *supra* note 181, at 38 n.\*. The parental determination seems to be one that is made at the time of separation rather than prior to marriage, however.

208. 2 J. BISHOP, COMMENTARIES ON THE LAW OF MARRIAGE AND DIVORCE § 530 (1881).

209. *Id.* § 532, at 457.

210. *Id.* at 458.

211. *Id.*

212. *Id.*

213. See *Jarrett v. Jarrett*, 78 Ill. 2d 337, 400 N.E.2d 421 (1979) (even without specific showing of adverse effect on children, the open and continuing cohabitation of custodial parent justified change in custody), *cert. denied*, 449 U.S. 927 (1980); see Annotation, *Award of Custody of Child to Parent Against Whom Divorce is Decreed*, 23 A.L.R.3d 6 (1969) (setting forth general principles of the fault approach).

214. Annotation, *supra* note 212, § 2, at 16, 20-21.

215. Annotation, *supra* note 212, § 5, at 38-47.

the divorced spouse, if shown to be at fault, is a worse parent than the other spouse. It attempts to determine which of two fit psychological parents is the more deserving parent to remain in daily contact with the children. The contractual approach does not abandon the best interests of the child rule, because it requires as a threshold that the custodial parent is a fit parent and a psychological parent. It does, however, move in the direction of parental right, stating that loss of daily contact with one's children is a cost that should be borne by the spouse responsible for the breakup of the family.

Although the state has a strong interest in seeing that the best interests of children are served, the state's ability to determine what is in the best interests of the children is limited. To some extent, the use of the primary caretaker presumption indicates the state is satisfied that a categorical approach adequately secures the interests of the child. The contractual approach does no more than this. The court is not precluded from denying custody when it can be shown by clear and convincing evidence that such placement is seriously detrimental to the children. Thus, the spouse seeking a no-fault divorce would not receive custody of the children unless she can show by clear and convincing evidence that the children would experience serious detriment unless they were placed with her.

## V. CONCLUSION

Antenuptial agreements restricting the right to divorce, directly or indirectly, are based on two recent changes in the law. The first is the liberalization of the divorce laws making pure unilateral no-fault divorce possible. Thus, one spouse can terminate the marriage and leave the other significantly worse off, especially with respect to job or career and to daily contact with the couple's children. The second recent change is the validation of divorce planning in antenuptial agreements. This change rests on a recognition of marriage as primarily a private matter, albeit one with significant public consequences. Therefore, marriage is a matter which may be privately regulated, and this regulatory power can be used to counteract the adverse consequences of the liberal modern divorce law. What is unresolved is the permissible extent of private regulation—more specifically, whether it extends to direct or indirect restrictions on the right of divorce.

To the extent that marriage is a cooperative venture for mutual advantage, it is suitable to the analysis of rational choice, which has played a significant role in moral philosophy in recent years. This philosophical literature maintains that it is in one's rational self-interest to constrain one's freedom in order to protect cooperation, which, if mutual, will generate greater benefits for all than will individual maximizing by each person. Constraints are necessary to deter and/or compensate for betrayals of the cooperative venture by its members. Because members do not cease to be individualistic utilitarians upon entering into the cooperative venture, but enter it precisely because they are individualistic utilitarians, the possibility remains that a member may behave selfishly, either be-

cause she is able to seize for herself the fruits of cooperation or because she has a better option outside the venture.

An antenuptial agreement restricting divorce would use two familiar legal mechanisms: a bar to divorce and burdens imposed on the decision to divorce, such as unfavorable divisions of property and future income and unfavorable custody awards. Both these mechanisms would be subject to challenges under constitutional and contract law. Regarding the constitutional challenge, although some legal scholars have argued for a constitutional right to pure unilateral no-fault divorce, an analysis of the Supreme Court's recent marriage and divorce cases indicates that such a position is unwarranted. The Model Agreement, therefore, should withstand a constitutional challenge.

A challenge under contract law is more problematic. There are only two appellate cases dealing with anything resembling the Model Agreement; both are readily distinguishable. In *Towles*, the bar was limited to the wife and was absolute; in *Sanders*, a burden approach was used that applied to both spouses, but the burden was forfeiture of all marital property, which also was absolute. Because *Towles* and *Sanders* do not provide much guidance, this Article examined cases from analogous areas of contract law. These cases do cast doubt on the validity of barring divorce, even if only on a limited basis. Covenants not to sue in negligence are generally held valid; the covenant not to sue for divorce is analogous in that it does not purport to bar divorce absolutely in the event of marital fault. However, other areas of contract law, specifically those dealing with partnerships for a term and negative covenants in personal service contracts, place a high value on individual freedom and the power to terminate these close relationships at will. On the other hand, the traditional recognition of the marital partnership as having a strong legal bond, together with the availability of more weakly bonded relationships such as unmarried cohabitation and marriage with unilateral no-fault divorce, provides, in a liberal, pluralistic society, a basis in principle for specifically enforcing the bar.

The use of financial deterrents on divorce is less problematic than barring divorce. *Posner* and its progeny accept divorce planning in antenuptial agreements that leaves one spouse in a worse position than she would be were the agreement disregarded. One post-*Posner* case, *Noghrey*, dealt with a situation in which one spouse would have profited under an antenuptial agreement from divorcing the other. The court invalidated the agreement. However, the Model Agreement does the opposite: the divorcing spouse, whether or not she is the wealthier, suffers financially from the divorce. The unequal distribution provided in the Model Agreement is justified as liquidated damages for the losses divorce imposes on the divorced spouse, rather than as a penalty on the other. Further, because the Model Agreement also favors a spouse who can show marital fault on the part of the other, goading is deterred because the goader may be found to have been cruel under the terms of the agreement.

Finally, and most controversially, the Model Agreement generally denies child custody to the spouse who obtains a unilateral no-fault divorce. Custody is awarded to the divorced spouse unless the divorcing spouse either can show the

divorced spouse to be at fault or can show by clear and convincing evidence that placement with the divorced spouse would be seriously detrimental to the children. This approach is consistent with the best interests of the child standard if that standard is interpreted so as not to discriminate between psychological parents. Under this view, the best interests of the child test requires only that the child be placed with a psychological parent. It does not require that a court determine which parent is the primary caretaker or that the court undertake an extensive, and arguably discredited, search for the best once it has determined who the psychological parents are. The approach embodied in the Model Agreement maximizes the sum of the welfare of the children and the divorced spouse, while "satisficing" the welfare of the children. It is based on the position that the parent-child relationship is as significant as the interspousal relationship and that the former relationship, which suffers substantial damage when a person becomes a noncustodial parent, should not be put at the risk of a pure unilateral no-fault divorce. Unless the spouse who desires to break up the family has good cause by showing marital fault on the part of her spouse, she should not have the power to virtually terminate the other's relationship with the children.

## APPENDIX. A MODEL AGREEMENT: TEXT AND COMMENTARY

1. The parties take seriously the traditional commitment of persons to remain married to one another until they are separated by death, and they wish to bind themselves legally to that commitment.

2. They realize that they cannot know the future, and they are aware that strains and differences may develop between them, but they trust that each will attempt to resolve any such strains and difficulties that may arise. Such attempts may be made either between themselves or with the assistance of others.

3. They reject divorce as a means of resolving marital differences and strains, except in very limited circumstances (see paragraph 7 below).

4. Therefore, they agree that neither shall seek a divorce on the grounds of a period of separation, or on the grounds of incompatibility, or on the ground that their marriage is irretrievably or irremediably broken, or on any other ground unless the other spouse is guilty of abandonment, adultery, or cruelty as defined in paragraph 11 below.

*Comment.* A more stringent alternative to the Model Agreement's limitation of the right of divorce is a complete bar. Roman Catholics, for example, who want civilly to replicate the Church's strictures on divorce could choose to bar divorce absolutely. Absolute bars to divorce are ill-advised, however. First, they seem very imprudent. It makes no sense (to me, at any rate) for a spouse who has been abandoned or who is the victim of spousal battery to be contractually barred from obtaining a divorce.<sup>216</sup> Another reason that absolute bars are ill advised is that they are much more likely to be held void as against public policy than are limited bars, such as bars limited to no-fault divorce.

A difficult problem of interpretation arises with the use of the term "cruelty." In the era of fault divorce, that term had a wide range of meanings.<sup>217</sup> Cruelty ranged all the way from severe beating at one end of the spectrum to mere incompatibility at the other—as in a spouse who does not take a sufficient interest, in the other spouse's opinion, in the other's work or leisure activities.<sup>218</sup> If cruelty is interpreted so broadly as to include incompatibility, we have virtually reentered the realm of unilateral no-fault divorce. It will be necessary, then, to interpret the term cruelty restrictively. Such an interpretation is implicitly called for simply by the context. Because the purpose of the agreement is to

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216. Adultery has long been a fault ground for divorce. Although it retains in some states a special place among marital faults, it seems to me that unless the adultery amounts to abandonment or cruelty, it is not the kind of fault, like battery, that is inconsistent with a spousal relationship. Of course, the victim spouse can always choose not to obtain a divorce even if she has grounds. As for the adulterer, she is aware that adultery has long been considered a serious marital offense and should not be surprised if the other spouse seeks a divorce on that ground. The parties, may, however, choose not to make adultery one of the grounds that permit a spouse to obtain a divorce.

217. H. CLARK, *supra* note 6, § 12.4, at 341-44.

218. Compare *Rios v. Rios*, 34 A.D.2d 325, 311 N.Y.S.2d 664 (1970) (requiring pattern of actual violence or conduct such as seriously affects the health of the spouse and threatens to impair it and renders it unsafe to cohabit), *aff'd*, 29 N.Y.2d 840, 277 N.E.2d 786, 327 N.Y.S.2d 853 (1971) with *Barngrover v. Barngrover*, 57 Cal. App. 43, 206 P. 461 (1922) (mental cruelty consisting of persistent nagging).

reject the availability of unilateral no-fault divorce to the parties, it would be inconsistent with that purpose to interpret cruelty so broadly that it meant nothing more than incompatibility. This point is emphasized by paragraph 9, which provides that failure to resolve or even attempt to resolve marital difficulties is not a ground for divorce. In other words, cruelty cannot be interpreted so broadly as to cover this situation.

On the other hand, how restrictive should the cruelty ground be? Should it be limited to battery? There is support in the case law for such a limitation, especially when the state provided for no-fault divorce as well.<sup>219</sup> There are two explanations for such a narrow interpretation in those situations. First, the legislature may have intended the narrow interpretation because of the conceptual contrast with a no-fault divorce provision. Second, because the parties have a no-fault exit from marriage, the court can afford to deny divorce on the cruelty ground because the spouses are not locked into an unhappy marriage. In our situation, of course, by limiting the coverage of cruelty, the court is locking the parties into a marriage in which one of them, at least, is unhappy.

The cruelty provision should be elaborated to state "cruel and wanton conduct calculated to inflict suffering. A showing of spousal incompatibility or that the marriage is irretrievably or irremediably broken does not satisfy this definition." The goal of this provision is to permit a spouse who is actually the victim of spousal abuse, either mental or physical, to obtain a divorce without suffering the forfeitures stated in the agreement. Of course, this provision is not foolproof. A judge could "interpret" this provision to be the functional equivalent of unilateral no-fault divorce. The fundamental goal of the agreement remains, however; namely, to contract out of the regime of unilateral no-fault divorce.

5. Should either party seek a divorce, this agreement shall bar the party from being granted such a divorce unless the divorcing spouse is able to show that the divorced spouse is guilty of abandonment, adultery, or cruelty.

6. Except as provided in paragraph 7, should either spouse obtain a unilateral no-fault divorce, all of the following provisions shall be enforced. [Subsections set out below]

*Comment.* Bar (paragraph 5) and burdens (paragraph 6) may be used in the alternative or in conjunction. The bar is the stronger approach, but it may not be effective. Even assuming the state in which the spouses are domiciled would uphold the agreement, other states may not. The history of divorce mills in the United States suggests that some states may not give any effect to the agreement. Since a state in which a person is domiciled can grant a divorce that will have nation-wide effect,<sup>220</sup> the bar provision is vulnerable to a spouse's moving to a more receptive jurisdiction.

The burdens approach, although nominally weaker, is not vulnerable to a migratory divorce, since a state must have personal jurisdiction over both

219. See *Hessen v. Hessen*, 33 N.Y.2d 406, 308 N.E.2d 891, 353 N.Y.S.2d 421 (1974).

220. *Sherrer v. Sherrer*, 334 U.S. 343 (1948); *Williams v. North Carolina*, 325 U.S. 226 (1945).



spouses in order to adjudicate property and support matters<sup>221</sup> and jurisdiction over the children in order to decide child custody.<sup>222</sup> Assuming that the state which had been the spouses' matrimonial domicile would uphold the agreement, a spouse cannot unilaterally rescind the agreement by forum shopping. Thus the "burdens" approach has the higher probability of being efficacious. At the same time, if the burdens do not have a deterrent effect, a spouse may wish to have the bar provisions to block divorce.

(1) The divorced spouse shall receive sole legal and physical custody of the children unless it can be shown by clear and convincing evidence that such placement is seriously detrimental to the children.

*Comment.* This provision favors the divorced spouse (or the divorcing spouse under paragraph 8) by giving custody to the parent who has not dissolved the marriage. It provides, in effect, that even a primary caretaker cannot deprive the other parent of daily contact with his or her children unless that other parent has caused the dissolution of the marriage through his or her fault.<sup>223</sup>

(2) The spouses' property shall be divided as follows:

(a) The divorced spouse shall receive 50% of that portion of the net value of the divorcing spouse's commercial or professional goodwill, licenses, or degrees developed or earned during their marriage.

(b) The divorcing spouse shall receive none of the value of the divorced spouse's commercial or professional goodwill, licenses, or degrees.

(c) Regarding the remainder of the spouses' property, the divorced spouse shall receive 75% of the net value of the spouses' property (including marital property and the divorcing spouse's separate property) with a net value up to twice the family's annual income. In this regard, marital property shall be exhausted before the divorcing spouse's separate property is divided. The parties shall equally divide the net value of marital property with a net value greater than twice the family's annual income.

(d) Normally the family's annual income shall be determined by its actual income over the twelve months immediately prior to divorce. If that amount is abnormally high or low, the family's annual income shall be determined by what would have been normal income for the family during that period. The spouses can determine what was normal either by agreement between themselves or by an arbitrator.

(e) If there are liquidity problems, they shall be resolved by agreement between the spouses or by an arbitrator.

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221. *Vanderbilt v. Vanderbilt*, 354 U.S. 416 (1957); *Estin v. Estin*, 334 U.S. 541 (1948).

222. Parental Kidnapping Prevention Act of 1980, 28 U.S.C. § 1738A (1982); UNIF. CHILD CUSTODY JURISDICTION ACT § 3 (adopted, with some variations, in all states).

223. See *supra* text accompanying note 183-214.

(f) The divorcing spouse shall have no right to any of the separate property of the divorced spouse.

*Comment.* Because the parties may not know at the beginning of their marriage what their wealth will be at the time of separation or divorce, should one of them decide to separate or divorce, nor do they know what impact inflation will have on the value of a dollar, it is sensible to draft this provision using percentages rather than dollars.

The agreement adopts the view that human capital, in the form of commercial or professional goodwill, licenses, or degrees, is a family asset and thus should be divided between the spouses.<sup>224</sup> Under the agreement, the present value of the asset is divided equally. The asset is not valued at the annual income of the asset-holder, but only at the portion of that income attributable to the asset.<sup>225</sup> Moreover, if the asset was developed prior to marriage, that portion of the value of the asset attributable to such premarital development is viewed as an individual rather than a family asset and thus is not subject to division.<sup>226</sup>

The agreement divides the other property in a manner that favors the divorced spouse (or the divorcing spouse when the other is guilty of abandonment, adultery, or cruelty), but, unlike the Sanders' agreement,<sup>227</sup> it stops short of giving all the spouses' property to the favored spouse. In some situations, such a remedy might be out of line with the needs of the divorced spouse and result in a draconian penalty, whose doubtful enforceability might render the entire provision, perhaps the entire contract, unenforceable.

I have further sought to avoid a punitive distribution of property by linking the unequal division to the annual income of the parties. Thus, the property subject to distribution is distributed unequally (75%-25%) only up to the point at which it is equal to twice the family's annual income. Thereafter, it is divided equally. A study by Weitzman shows that for lower income families, net assets were less than annual income.<sup>228</sup> It was only in groups in which the family's income exceeded \$30,000 that the median value of net assets exceeded the median income. Thus, for lower income families, the divorced spouse will probably receive 75% of all property; as the income level increases the probability increases that the twice-annual-income cap on unequal distribution will be reached.

Thus if a family had annual income of \$40,000 and property with a net worth of \$100,000, the divorced spouse would receive \$70,000, consisting of 75% of the first \$80,000 (i.e., \$60,000), and half of the remaining \$20,000 (i.e., \$10,000). Thus the divorced spouse would receive 70% of the spouses' property

224. See *O'Brien v. O'Brien*, 66 N.Y.2d 576, 489 N.E.2d 712, 498 N.Y.S.2d 743 (1985); Krauskopf, *Recompense for Financing Spouse's Education: Legal Protection for the Marital Investor in Human Capital*, 28 U. KAN. L. REV. 379 (1980).

225. *O'Brien*, 66 N.Y.2d at 588, 489 N.E.2d at 718, 498 N.Y.S.2d at 749; *Haugan v. Haugan*, 117 Wis. 2d 200, 213-15, 343 N.W.2d 796, 803 (1984); Krauskopf, *supra* note 223, at 382-84.

226. This is simply an extension of the familiar source-of-funds approach used to divide property that is both separate and marital. See Krauskopf, *Principles of Property Distribution*, in 3 FAMILY LAW AND PRACTICE § 37.08[3][b] (A. Rutkin ed. 1987) ("Source of Funds Theory").

227. See *supra* text accompanying notes 1-3.

228. Weitzman, *supra* note 41, at 1192-93.

not counting her own separate property, which would not be subject to division. If the family had the same income but \$200,000 in marital property, the divorced spouse's share of the total would fall to 60% because she would receive only half of the second \$100,000 thereby giving her a total of \$120,000.

There is nothing scientific about the numbers—either the 75%-25% division or using twice the annual income as a break point. I chose round numbers to roughly compensate the divorced spouse for losses resulting from divorce and thus deter the divorcing spouse, but not do more than that—that is, not punish the divorcing spouse. Arguably, the break point should be equal to the annual income or to something more than twice the annual income. The line I have drawn attempts to take into account that the lower the amount of property the more painful its loss. In this manner the distribution substantially favors the divorced spouse until a point is reached at which the accumulated property substantially exceeds the annual income.

Both the separate property of the divorcing spouse and the marital property are available for distribution up to the amount of twice the annual income. Thereafter, separate property is distributed entirely to the spouse whose separate property it is, whether or not she is the divorcing spouse. Only if the marital property exceeds twice the annual income will that excess amount be distributed, and it will be distributed equally. The divorcing spouse's separate property is made subject to distribution on the belief that the family has a strong claim to even the separate property of either spouse at lower levels of accumulation—that is, where the spousal property, including marital property, is less than twice the annual income.

*Special situations* (paragraph 6(2)(d)). A classic situation in which the last year's income would not be the proper standard would be one in which the divorcing spouse intentionally depresses her income.<sup>229</sup> Another situation might be one in which the divorced spouse ceases earning income in order to be at home with the children.<sup>230</sup> In either situation, it may be fairer to choose another number as the family's normal annual income rather than the family's actual income in the year preceding divorce.

(3) The divorced spouse shall receive as much of the income of the divorcing spouse, from whatever source, as is necessary for the divorced spouse to receive at least 60% of the total income, earned and unearned, of the two spouses. This right shall continue until the divorced spouse either remarries or forms an intimate association with another person and cohabits with that person.

If at any time there is a substantial decrease in the income of either former spouse, the other may seek arbitration to determine whether payments should be based on earning capacity rather than on actual income.

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229. See, e.g., *Herndon v. Herndon*, 305 N.W.2d 917 (S.D. 1981); *Ward v. Ward*, 50 So. 2d 477 (Fla. Dist. Ct. App. 1987) (voluntary early retirement).

230. Cf. *Bender v. Bender*, 297 Pa. Super. 461, 444 A.2d 124 (1982) (courts should consider a parent's desire to stay home to "nurture" children in determining whether wife should be relieved of contributing to child's monetary support).

*Comment.* This provision works as follows. Let us assume that each spouse earns \$500 per week. The total income of the spouses is \$1000 per week. The divorced spouse is entitled to 60% of that amount, or \$600, which would mean that the divorcing spouse would transfer \$100 per week to the divorced spouse. If either spouse's income dropped to \$300 per week, the total income would drop to \$800. Sixty percent of \$800 is \$480. If it was the divorcing spouse's income that dropped, she would owe the divorced spouse nothing because she was already bringing in \$500, which is more than 60% of the total. On the other hand, if it was the divorced spouse's income that dropped to \$300 a week, the divorcing spouse would have to transfer \$180 a week in order for the divorced spouse to receive \$480, or 60% of the total.

In both cases, there may be cause for complaint. Either the divorced spouse's weekly income drops substantially—from \$ 600 to \$480—or the divorcing spouse's weekly support increases substantially—from \$100 to \$180. This matter would need to be resolved if it arose either by an arbitrator or by negotiations in the shadow of such a third party decision.

(4) Child support shall be determined at the time of divorce either by agreement between the spouses or by an arbitrator. Such support may be revised from time to time on the basis of changed circumstance.

(a) Support shall be based on the needs of the children and the relative abilities of the parents to pay after the payments under paragraph 6(3) have been made.

(b) Neither the spouses' remarriage to other persons nor their having additional children, whether stepchildren, adopted children, or biological children, marital or nonmarital, shall be a factor in determining her ability to provide child support.

*Comment.* This agreement does not attempt to set child support prior to marriage.<sup>231</sup> It does, however, seek to prevent former spouses from obtaining judicial downward modification of child support obligations because of new families.<sup>232</sup>

7. Abandonment, adultery, and cruelty (each as defined in paragraph 11 below) shall constitute a breach of this agreement, and the party who is a victim of such act or acts may seek and obtain a divorce (either a divorce from bed and board or an absolute divorce) on the grounds available to him or her under the applicable state law (whether fault or no-fault grounds). The party who is guilty of abandonment, adultery, or cruelty is not thereby released from this agreement, and the agreement shall continue to be a complete bar to his or her obtaining a divorce.

231. See *In re Marriage of Ayo*, 190 Cal. App. 3d 442, 235 Cal. Rptr. 458 (1987); *Miesen v. Frank*, 361 Pa. Super. 204, 522 A.2d 85 (1987); UNIF. PREMARITAL AGREEMENT ACT § 3(b) ("The right of a child to support may not be adversely affected by a premarital agreement.").

232. See *Lambert v. Miller*, 358 S.E.2d 785, 790-91 (W. Va. 1987); Annotation, *Remarriage of Parent as Basis for Modification of Amount of Child Support Provisions of Divorce Decree*, 89 A.L.R.2d 106 (1963).

*Comment.* See Comment to paragraph 4.

8. A spouse who has not breached the agreement under paragraph 7 and who obtains a divorce and has shown that the other spouse has breached the agreement under paragraph 7 is entitled to the benefits set out in paragraph 6.

*Comment.* When the divorcing spouse can show that the divorced spouse was at fault, and the divorced spouse cannot show that the divorcing spouse was at fault, the provisions of paragraph 6 are applied in favor of the divorcing spouse rather than the divorced spouse.

9. The failure to resolve marital difficulties and the failure to attempt to resolve any such difficulties shall not constitute a breach of this agreement.

*Comment.* Thus, a failure to attempt to resolve marital difficulties does not in itself amount to cruelty.

10. The parties reserve the power to rescind this agreement by mutual agreement. Such agreement to rescind must be in writing, signed and notarized.

*Comment.* The parties retain the right to rescind the contract and reenter the state's unilateral no-fault divorce regime. In order to assure deliberation, the contract requires signature and notarization.

11. *Definitions:*

(1) *Abandonment*—Physical separation from the other spouse for one month with the intention to discontinue permanently the marital cohabitation and without the consent of the other spouse.

(2) *Adultery*—Voluntary sexual intercourse, including sodomy, with a person other than one's spouse.

(3) *Cruelty*—Cruel and wanton conduct calculated to inflict suffering on the other spouse. A showing of spousal incompatibility or that the marriage is irretrievably or irremediably broken does not satisfy this definition.

(4) *Divorced spouse*—The spouse other than the one filing for divorce after the time of filing.

(5) *Divorcing spouse*—The spouse who files for divorce.

(6) *Family's annual income*—Earned and unearned of both spouses regardless of whether the unearned income was from marital or separate property.